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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2018-001701
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center. ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, ... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is ..... Petitioner.

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Douglas M. Muller, SC Bar #10277
Trudy H. Robertson, SC Bar #64856
E. Brandon Gaskins, SC Bar #73274
Moore & Van Allen, PLLC
78 Wentworth Street
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 Telephone
(843) 579-7099 Facsimile
Email: *dougmuller@mvalaw.com*
Email: *trudyrobertson@mvalaw.com*
Email: *brandongaskins@mvalaw.com*

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System

Daniel J. Westbrook, SC Bar #012939
Stuart M. Andrews, Jr., SC Bar #000400
Susanna Knox, SC Bar #100954
Nelson, Mullins, Riley & Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000 Telephone
(803) 256-7500 Facsimile
Email: *stuart.andrews@nelsonmullins.com*
Email: *dan.westbrook@nelsonmullins.com*
Email: *susannah.knox@nelsonmullins.com*

Attorneys for Respondent, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center

(caption continued from cover page):

Ashley C. Biggers, SC Bar #17225
Vito M. Wicevic
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201
(803) 898-3350 Telephone
Email: *biggerac@dhec.sc.gov*
Email: *wicevivm@dhec.sc.gov*

Attorneys for Respondent South Carolina Department of Health and Environmental Control

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center .....Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

APPELLANT'S MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS PENDING FINAL RESOLUTION OF APPEALS PROCESS

Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of the Appeals Process pursuant to Rule 241 of the South Carolina Appellate Court Rules ("SCACR") and S.C. Code Ann. § 1-23-380(2).

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SC Court of Appeals

I. SUMMARY OF ARGUMENT

As required by S.C. Code Ann. § 44-7-220(B), Carolinas posted a $1.5 million dollar bond to perfect its appeal of the Administrative Law Court's denial of its application for a certificate of need to construct a hospital in Fort Mill, South Carolina. Carolinas now seeks relief from the appeal bond because it is unconstitutional under the South Carolina and United States Constitution. The bond requirement under § 44-7-220(B) violates the separation of powers doctrine under the South Carolina Constitution because it interferes with the South Carolina Supreme Court's constitutional authority to promulgate its rule of procedure and practice in the appellate courts of this State. The bond requirement also violates the Equal Protection Clause of the South Carolina and United States Constitution because it imposes an arbitrary and discriminatory appeal bond requirement on a narrow class of appellants without being rationally related to a legitimate state interest. Moreover, § 44-7-220(B) violates the due process provision of Article I, § 22 of the South Carolina Constitution by substantially burdening appellants' rights to judicial review of the Administrative Law Court's certificate of need decisions involving a competing applicant.

In addition, Carolinas seeks a supersedeas to prevent Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont") from constructing the hospital in question during the pendency of this appeal. Supersedeas is appropriate in this action to protect Carolinas from the irreparable harm it will suffer if Piedmont is allowed to erode Carolinas' market share through the construction of a new hospital while this appeal is pending. To the extent that the Court concludes that a bond is required to protect Piedmont from injury resulting from the

supersedeas, it should use all or part of the bond posted by Carolinas under § 44-7-220(B) as security to compensate Piedmont from any injury actually suffered as a result.

II. PROCEDURAL BACKGROUND

This case has a lengthy procedural history. In 2005, Carolinas, Piedmont, and a third applicant, Presbyterian Healthcare ("Presbyterian"), filed certificate of need ("CON") applications with the South Carolina Department of Health and Environmental Control ("DHEC") to construct and operate a sixty-four (64) bed general acute care hospital in York County, South Carolina ("Fort Mill CON"). On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and granted the application of Piedmont for a new, one hundred (100) bed hospital. At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a CON to build a new hospital in the county. Carolinas and Presbyterian timely requested a contested case to challenge DHEC's decision with the South Carolina Administrative Law Court ("ALC"). The cases were consolidated and assigned to Judge Carolyn C. Matthews (the "First Contested Case").

In September 2009, Judge Matthews presided over a three (3) week hearing in the First Contested Case. After Carolinas and Piedmont concluded their cases, Judge Matthews granted their Motions for Summary Judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. As a result, Judge Matthews remanded the applications to DHEC for further review consistent with her instructions.

Piedmont appealed Judge Matthews's Order to the South Carolina Supreme Court, and Carolinas and Presbyterian cross-appealed. In a decision dated April 8, 2010, the South Carolina Supreme Court denied the appeal. According to the Supreme Court, Judge Matthews's Order was not a "final decision" that was immediately appealable under S.C. Code Ann. § 1-23-610, which limits appellate review to final decisions of the ALC. The Supreme Court concluded that "a final determination as to the [CON] has not been made" because Judge Matthews had remanded the matter to DHEC for further review. Accordingly, the Supreme Court dismissed the appeal and remanded the matter to DHEC in accordance with Judge Matthews's Order.

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted by Carolinas, Presbyterian, and Piedmont. On September 9, 2011, after a full and complete review of the CON applications and updated materials, DHEC granted the CON to Carolinas and denied Piedmont's and Presbyterian's applications. On November 15, 2011, Presbyterian and Piedmont filed requests for a contested case with the ALC to review DHEC's award of the Fort Mill CON to Carolinas (the "Second Contested Case"). Presbyterian has since withdrawn from the Second Contested Case.

The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed from the date of filing in November 2011 through a hearing on the merits conducted over fifteen (15) days in March and April 2013. Approximately a year after the hearing on the merits, the ALC issued a Final Order dated March 31, 2014 (the "Final Order") reversing DHEC's decision, granting a CON to Piedmont, and denying a CON to Carolinas. On April 9, 2014, Carolinas timely filed a Motion to Alter or Amend the Final

Order pursuant to ALC Rule 29(d) and Rule 59, SCRCP. On May 2, 2014, the ALC vacated the Final Order. On December 15, 2014, this Court issued an Amended Final Order (the "Amended Final Order") in which it maintained its previous ruling reversing DHEC's decision, granting a CON to Piedmont, and denying the CON to Carolinas. Carolinas received written notice of the entry of the Amended Final Order on December 15, 2014, and filed a Notice of Appeal (attached as **Exhibit A**) with the South Carolina Court of Appeals on January 14, 2015.

After filing the Notice of Appeal, Carolinas filed a Cash Bond (attached as **Exhibit B**) pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by that statute.

On January 28, 2015, Carolinas filed a Motion to Stay/Supersedeas (attached as **Exhibit C**) with the ALC, as required by Rule 241(d)(1). On February 10, 2015, Judge Lenski granted the Motion to Stay/Supersedeas (attached as **Exhibit D**). After the issuance of the Order on the Motion to Stay/Supersedeas, Piedmont maintained that Judge Lenski had failed to consider Piedmont's Response Memorandum, which was inadvertently sent to the wrong judge. Thereafter, on February 12th, Judge Lenski vacated his February 10th Order (attached as **Exhibit E**), and on February 20, 2015, he reversed his prior decision and denied Carolinas' Motion for Stay/Supersedeas (attached as **Exhibit F**). In his February 20, 2015 Order denying Carolinas' Motion to Stay/Supersedeas, Judge Lenski relied heavily on the legal arguments made in Piedmont's Response Memorandum, which in turn relied upon a single-judge decision in *Grand Strand Regional Medical Center v. South Carolina Dept. of Health and*

Environmental Control, App. Case No. 2014-000973 (S.C. Ct. App. Dec. 16, 2014). The single-judge decision in *Grand Strand* is currently being reviewed by a three-judge panel on a Petition for Rehearing.[1]

Carolinas now moves for relief from the bond requirement under § 44-7-220(B) and petitions the Court for supersedeas to prevent Piedmont from constructing the new hospital while this appeal is pending.

III. PERTINENT FACTS

In its court filing in connection with its opposition to Carolinas' Motion to Stay/Supersedeas filed with the ALC, Piedmont takes the position that: (1) no stay or supersedeas should be imposed; (2) it intends to proceed with the construction of a new hospital because of the absence of a stay or supersedeas; (3) the cost of the new hospital will range from $119 million to $146 million; and (4) if Carolinas is successful in its appeal, it will agree to cease "construction or operation" of the new, $100+ million hospital, which is adequate enough to preserve the *status quo*. *See* Piedmont Response Memorandum at pp. 1, 4 fn. 1, 10, 11 (attached as **Exhibit G**).

IV. LEGAL ARGUMENT

A. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional.

1. History of S.C. Code Ann. § 44-7-220(B).

In 1990, by adopting 1990 South Carolina Laws Act 471 (S.B. 927) ("Act 471"), the South Carolina General Assembly created a judicial review process for the denial of CON applications that included a bond requirement for the first level of judicial review at the circuit court level. Significantly, this bond requirement imposed a discretionary, not

[1] Oral argument on the Petition for Rehearing in the *Grand Strand* case was conducted on February 25, 2015.

mandatory, award of the bond amount to the respondent if judicial review was unsuccessful. Act 471 provided in pertinent part:

> After the contested case hearing is concluded and a final board decision is made, a party who participated in the contested case hearing and who is affected adversely by the board's decision may obtain judicial review of the decision in the circuit court pursuant to the Administrative Procedures Act.... An applicant whose Certificate of Need application is denied by the board in favor of a competing application or a party adversely affected by the board's decision shall deposit a bond with the clerk of court for the circuit court before the filing of a petition to appeal a final decision of the board granting or denying a Certificate of Need. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or twenty thousand dollars, whichever is greater. **If the court affirms the decision of the board or dismisses the appeal, the court may award to the applicant approved for the Certificate of Need who is a party to the appeal all or a portion of the bond** and may award reasonable attorney's fees and costs incurred in the appeal.

(Emphasis added). Subsequently, in 2006 South Carolina Laws Act 387 (H.B. 3285) ("Act 387"), the South Carolina General Assembly streamlined judicial review of CON cases by providing for a direct appeal from the ALC to the South Carolina Court of Appeals without resort first to the circuit court. Although there had been a previous bond requirement for judicial review by the circuit court, the changes made by Act 387 did not clearly specify whether a bond was required in the Court of Appeals.

Thereafter, in July 2010, the South Carolina legislature enacted 2010 South Carolina Laws Act 278 (S.B. 337) ("Act 278"), which, among other things, clarified the bond requirement for CON appeals. Specifically, Act 278 amended S.C. Code Ann. § 44-7-220(B) to provide in pertinent part as follows:

> If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application..., the party filing the appeal shall deposit a bond with the Clerk of the Court of Appeals within five calendar days after filing the petition to appeal. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. **If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond** and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application ... and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals.

(Emphasis added).

In this case, because the statutory language applies the bond requirement to any party that is requesting appellate review of "the reversal of the ALC's decision to approve the Certificate of Need application," and because Carolinas' application and Piedmont's application were "competing," Carolinas was required to post a substantial bond in the maximum statutory amount of $1.5 million to pursue an appeal. Further, if Carolinas' appeal fails, forfeiture of the entire bond amount is now mandatory, not discretionary, regardless of the actual losses or delay incurred by the prevailing respondent.

2. <u>The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Separation of Powers Doctrine</u>.

The South Carolina Constitution mandates that the powers of government be divided between three branches and forbids one branch from interfering with the

operations of another branch. *State v. Langford*, 400 S.C. 421, 434, 735 S.E.2d 471, 478 (2012). The South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

S.C. Const. art. 1, § 8. The separation of powers doctrine "prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws." *Langford*, 400 S.C. at 434, 735 S.E.2d at 478 (quoting *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982)).

Article V, § 4, of the South Carolina Constitution vests the authority to establish rules and procedures for the courts of the State in the South Carolina Supreme Court by providing, in relevant part:

> The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.

As such, South Carolina's constitutional mandate of separation of powers makes clear that the Supreme Court governs practice and procedure in the courts and that the General Assembly cannot make rules of court by enacting statutes. *In re Circuit Court Rule 102*, 1982 S.C. LEXIS 483, *3 (S. Ct. Aug. 31, 1982).

In this case, the General Assembly's enactment of the bond requirement under S.C. Code Ann. § 44-7-220(B) constitutes an unconstitutional violation of the separation of powers doctrine by making rules of the court for the perfection of an appeal from an

administrative decision and for an appeal bond, which is the exclusive domain of the judicial branch. The Supreme Court has promulgated rules governing appellate procedures for an appeal from a CON decision, and § 44-7-220(B) interferes with these rules by mandating certain actions required to perfect an appeal. Specifically, Rule 203(b)(6), (d)(2), and (e)(2), SCACR, prescribe the method for a party to appeal a CON decision from the ALC. The procedure and manner for perfecting an appeal from the ALC under Rule 203 do not require an appellant to file a bond for this Court to exercise jurisdiction over a CON appeal.

In contrast, § 44-7-220(B) requires an appellant from a CON decision involving a competing applicant to deposit a bond with the Court of Appeals of an amount equal to five percent of the total project cost up to a maximum of $1.5 million within five calendar days of filing the petition to appeal. Under § 44-7-220(B), the Court of Appeals does not have jurisdiction over a CON appeal involving a competing applicant unless the required appeal bond is posted within the statutory deadline. In effect, the bond requirement limits the jurisdiction of the Court of Appeals in such cases by creating a barrier to appeal that does not exist under the South Carolina Appellate Court Rules, as promulgated by the South Carolina Supreme Court.

Also, the Supreme Court has established the procedure governing appeal bonds in Rule 241, SCACR. Rule 241 provides as a general rule that a notice of appeal automatically stays matters decided in the decision on appeal with certain exceptions, including appeals from an administrative tribunal under S.C. Code Ann. § 1-23-380, such as the current matter. Under Rule 241(c), a party may move for a lifting of the automatic stay, or in cases subject to an exception of the automatic stay requirement, move for the

imposition of supersedeas, and the appellate court may condition the granting of supersedeas or lifting of the automatic stay upon the filing of a bond as it deems appropriate. Thus, Rule 241(c) grants the appellate courts considerable discretion in determining whether an appeal bond is appropriate and, if so, what the terms, conditions, and amount of such bond should be.

In contrast to the discretionary nature of an appeal bond under Rule 241(c), § 44-7-220(B) mandates with no exceptions that a party filing an appeal from a ALC decision denying a CON application involving a competing applicant must file a bond of up to a maximum of $1.5 million dollars. The appeal bond is required regardless of whether a stay or supersedeas is imposed. Moreover, the respondent is entitled to an award of all of the bond if it prevails on the appeal regardless of whether and to what extent it suffers any harm or damages as a result of the appeal. Thus, the mandatory forfeiture of the entire bond by an unsuccessful appellant serves as a penalty for filing an appeal. Put simply, § 44-7-220(B) removes the Court's discretion to determine whether a bond is appropriate, the amount of the bond, and to what extent, if any, the bond should be forfeited and awarded to the respondent. As such, § 44-7-220(B) directly conflicts with Rule 241(c) by removing the Court's authority in setting an appeal bond.

The conclusion that the bond requirement under § 44-7-220(B) violates the separation of powers doctrine comports with the South Carolina Supreme Court's Order promulgating former Circuit Court Rule 102, in which it declared its supreme and exclusive authority to promulgate rules of practice and procedure in South Carolina courts. *In re Circuit Court Rule 102*, 1982 S.C. LEXIS 483, *3 (S. Ct. Aug. 31, 1982). In that order, the South Carolina Supreme Court adopted former Circuit Court Rule 102,

which provided that an answer or demurrer to a complaint must be served within thirty days after service of the complaint. This rule conflicted with then S.C. Code Ann. § 15-13-310, which required an answer or demurrer to be served within twenty days of the complaint. Given the obvious conflict between the deadlines established by the statute and rule, the Supreme Court held that the deadline in Rule 102 superseded the deadline under § 15-13-310 because it, and not the legislature, had the exclusive constitutional power to promulgate rules of practice and procedure:

> There can be no question but that the orderly progression of cases through the judiciary is crucial to the exercise and functioning of the judicial power. Nothing could be more central to a tribunal than the procedure with which a controversy traverses from its initiation to its completion. Concomitant with this is the requirement that a court have authority to provide the procedural wherewithal to allow it to exercise its judicial power as required by the Constitution. We therefore hold that the judicial power of the court system inherently requires this Court to promulgate rules to promote justice and to insure its administration. . . .
>
> The judiciary is the branch required by the Constitution to promulgate rules or practice and procedure for the court system. In light of Article 1, § 8, this duty may not be performed, or discharged by another branch. 'The language is as strong as it is simple and clear. The Legislature cannot assume to itself to exercise of judicial powers' *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391. Nor may the Legislature infringe upon the court's duty in this area.

In re Circuit Court Rule 102, 1982 S.C. LEXIS 483 at *6-8. Therefore, the South Carolina Supreme Court has unequivocally recognized its exclusive power to promulgate rules of judicial practice and procedure which the legislature cannot invade. *See also Rutherford v. Rutherford*, 307 S.C. 199, 414 S.E.2d 157 (1992) (invalidating statute that limited Supreme Court's appellate scope of review in family court cases because

judiciary – not legislature – had authority to make rules for the court's practice and procedure).

Although South Carolina courts have not addressed the constitutionality of statutory appeal bonds and penalties that conflict with the applicable judicial rules of procedure, other jurisdictions have declared similar statutory appellate procedures to be constitutionally infirm under the separation of powers doctrine emanating from their respective state constitutions.[2] The most notable decision voiding a similar bond or penalty requirement is found in *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005). In *Elk Horn Coal*, the Kentucky Supreme Court addressed the constitutionality of a statute which required a party appealing a judgment for the collection of money that had been stayed pending the appeal to pay a penalty of ten percent of the judgment to the prevailing party if the appeal was unsuccessful. After declaring the penalty requirement unconstitutional under the Equal Protection Clauses of the United States and Kentucky Constitutions, the Kentucky Supreme Court also held that the appeal penalty was unconstitutional under Kentucky's separation of powers doctrine.

The court in *Elk Horn Coal* began its analysis by noting that the Kentucky Constitution delegates exclusively to the Kentucky Supreme Court the authority to adopt rules of practice and procedure governing the state's courts and that a constitutional violation of separation of powers occurs when the legislature promulgates rule of practice

[2] In addition to the cases discussed below, several jurisdictions have recognized that their judiciaries have the inherent authority to promulgate rules of practice and procedure before their courts under the separation of powers doctrine. *See Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 434 S.W.2d 288 (1968); *Holloman v. State*, 175 Ga. 232, 165 S.E. 11 (1932); *People ex rel. Stamos v. Jones*, 40 Ill. 2d 62, 237 N.E.2d 495 (1968); *Waite v. Burgess*, 69 Nev. 230, 245 P.2d 994 (1952); *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Ct. App. 1990); *Complaint Against Grady*, 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

and procedure for the courts, including the appellate jurisdiction of the Kentucky Supreme Court. *Id.* at 423. Recognizing it had established rules to deter frivolous discretionary appeals, the Kentucky Supreme Court found that the penalty imposed on an unsuccessful appellant under the statute involved in that case "deters discretionary review motions – both frivolous and meritorious – and it thereby limits or restricts the Kentucky Supreme Court in exercising its jurisdiction to review cases from lower courts." *Id.* at 424. Accordingly, the *Elk Horn Coal* court held that the statutory appeal penalty invaded the Kentucky Supreme Court's exclusive power to prescribe its own rules for exercising appellate jurisdiction. *Id.*

Similarly, the Illinois Court of Appeals invalidated a statutory method for perfecting an appeal from an administrative decision that conflicted with the Illinois Supreme Court's rules for appellate procedure under the separation of powers doctrine in *Consumers Gas Co. v. Illinois Commerce Com.*, 144 Ill. App. 3d 229, 493 N.E.2d 1148 (1986). In that case, a public utility providing natural gas products sought appellate review of the Illinois Commerce Commission's administrative decision denying its application for a rate increase. The statutory scheme enacted by the legislature for appealing decisions of the commission conflicted with the Illinois Supreme Court's procedure for pursuing direct appellate review. In deciding which appellate procedure governed the appeal, the court invoked the separation of powers doctrine to declare "judicial administration" to be one of the judiciary's "inherent powers worthy of protection against legislative encroachment." *Id.* at 236, 493 N.E.2d at 1152. Thus, the court held that the legislature's adoption of the statutory procedure for appealing an administrative decision of the commission was an unconstitutional violation of separation

of powers because the procedure conflicted with the Illinois Supreme Court's rules. *Id.* According to the court, the separation of powers doctrine "prohibited [the legislature] from establishing procedures for obtaining an appeal bond from an administrative decision where a supreme court rule is already in place for that purpose." *Id.* at 237, 493 N.E.2d at 1153.

Like the statutes invalidated in *Elk Horn Coal* and *Consumers Gas Co.*, the bond requirement in § 44-7-220(B) violates the separation of powers doctrine by encroaching upon the judicial department's exclusive authority to promulgate rules of appellate practice and procedure. Just as the Kentucky and Illinois Constitutions vest the authority to establish rules and procedure exclusively in their respective supreme courts, the South Carolina Constitution vests the same authority in the South Carolina Supreme Court. *See* S.C. Const. art. 1, § 8 and art. V, § 4. Pursuant to such power, the South Carolina Supreme Court has promulgated rules of procedure for the perfection of an appeal from an administrative decision and for the issuance of an appeal bond to protect a prevailing litigant from injury resulting from the delay of an appeal in appropriate circumstances, which are similar to the rules of court adopted by the Kentucky and Illinois Supreme Courts that superseded the statutory procedures in *Elk Horn Coal* and *Consumers Gas Co.* Section 44-7-220(B) effectively operates as the statutory appeal penalty did in *Elk Horn Coal* because it imposes a substantial penalty on an unsuccessful appellant, thereby deterring meritorious appeals and limiting the appellate courts' ability to review cases from the ALC. Moreover, the mandatory provisions of § 44-7-220(B) limit the courts' inherent authority to determine the terms and conditions of the bond imposed on a CON appellant. Similarly, the bond requirement under § 44-7-220(B), if not satisfied, conflicts

with the existing Supreme Court rules for perfecting an appeal from an administrative decision by depriving the appellate courts' of jurisdiction over CON appeals, and it is therefore similar to the statutory scheme voided in *Consumers Gas Co.* Accordingly, *Elk Horn Coal* and *Consumer Gas Co.* support the conclusion that the legislature's adoption of the bond requirement in § 44-7-220(B) constitutes an unconstitutional violation of the separation of powers doctrine.[3]

In sum, the bond requirement under § 44-7-220(B) violates the separation of powers doctrine by encroaching upon the judiciary's exclusive authority to promulgate rules of appellate practice and procedure. The bond requirement conflicts with the Supreme Court's rule for perfecting an appeal from an administrative tribunal by requiring a substantial appeal bond that deters appeals from a CON decision involving a competing applicant and thereby limits the Court of Appeals' ability to review such cases. Moreover, the mandatory bond requirement conflicts with the rule for appeal bonds by limiting the Court of Appeals' inherent discretion to determine the appropriate terms and conditions of an appeal bond. Therefore, the Court of Appeals should invalidate the bond requirement under § 44-7-220(B) as an unconstitutional violation of the separation of powers doctrine.

3. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Equal Protection Clause.

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection of the law essentially means "that all persons

[3] As aptly stated in *Elk Horn Coal*, the fact that the bond requirement has existed for many years unchallenged does not mean that it is constitutionally sound. *Elk Horn Coal.*, 163 S.W.3d at 412 ("But the long existence of an appeal penalty as a part of the law of this state does not insulate it from a constitutional challenge.").

similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny. *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 26, 736 S.E.2d 651 (2012). If the classification does not implicate a suspect class or abridge a fundamental right[4], the rational basis test is used. *Id.* at 26, 736 S.E.2d at 656. Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. *Id.* at 26, 736 S.E.2d at 656-657.

In this case, the bond requirement of § 44-7-220(B) violates the Equal Protection Clauses because it treats CON appellants differently than other appellants without being rationally related to any legitimate state interest. Section 44-7-220(B) imposes on appellants of an adverse CON decision involving competing applicants a substantial appeal bond that is not imposed on any other appellant. This bond requirement is a mandatory precondition to perfecting a CON appeal, and the appellate courts of this State have no discretion in requiring such bond. Moreover, § 44-7-220(B) mandates that the entire bond be forfeited to the respondent if the appellant is unsuccessful regardless of the

[4] While there may be some question about whether right of access to judicial review is a "fundamental right," one court considering a similar statute found it to be unconstitutional even under the "rational basis" standard. *See Elk Horn Coal,* 163 S.W.3d at 419 ("Instead of requiring a 'rational basis,' we have construed our Constitution as requiring a 'reasonable basis' or a 'substantial and justifiable reason' for discriminatory legislation in areas of social and economic policy. . . . We need not decide, however, whether the facts of this case require us to invoke Kentucky's heightened standard because we hold that KRS 26A.300 fails the rational basis test, which is sufficient to show a violation of the equal protection provisions of both Constitutions.").

merits of the appeal or the damage suffered by the respondent as a result of the appeal. Thus, the bond requirement operates as a penalty, imposes a substantial burden on unsuccessful CON appellants, and is unlike any appeal requirement imposed on other unsuccessful appellants in South Carolina courts.

Similar statutory bond penalties have routinely been held to violate the Equal Protection Clauses. The leading case on this issue is *Lindsey v. Normet*, 405 U.S. 56 (1971), in which the United States Supreme Court invalidated an Oregon law that imposed a double bond on tenants bringing an appeal under the state's Forcible Entry and Wrongful Detainer ("FED") statute. Under that statute, a tenant appealing an adverse decision under the FED statute was required to post a bond for twice the amount of rent during the pendency of the appeal, which was automatically forfeited to the landlord without proof of actual damage. *Id.* at 75. The purpose of the double bond requirement was to deter frivolous appeals. *Id.*

The Supreme Court ruled that the double bond requirement was unconstitutional under the Equal Protection Clause because no other appellant was subject to the automatic assessment of unproved damages:

> It cannot be denied that the double-bond requirement heavily burdens the statutory right of an FED defendant to appeal. While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord. This requirement is unnecessary to assure the landlord payment of accrued rent since the undertaking an FED defendant must file pursuant to the general appeal bond statute, ORS § 19.040 (b), must cover 'the value of the use and occupation of such property . . .

> from the time of the appeal until the delivery of the possession thereof,' and since the landlord may bring a separate action at law for payment of back rent under ORS § 91.220. Moreover, the landlord is protected against waste or damages occurring during the appeal by the § 19.040 (b) undertaking that the tenant must file if he wishes to remain in possession of the property during the appeal. The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond. The impact on FED appellants is unavoidable: if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.

Id. at 77-78. Thus, the Court held that double bond requirement was discriminatory, arbitrary, and irrational and, therefore, in violation of the Equal Protection Clause.

Relying on *Lindsey*, other courts have declared appeal bonds and penalties to be unconstitutional under the Equal Protection Clause because of their discriminatory effect on unsuccessful appellants. For example, in *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), the Ninth Circuit Court of Appeals invalidated a double-bond requirement under the federal Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(a). Although the court recognized that the statute was intended to deter frivolous appeals, it refused to uphold the requirement, observing that "*Lindsey* expressly held that there is no rational relationship between this admittedly legitimate purpose and a double bond requirement." *O'Day*, 536 F.2d at 860.

And in *Elk Horn Coal*, the Kentucky Supreme Court not only invalidated the appeal penalty imposed on money judgment appellants under the separation of powers

doctrine, it also ruled that the penalty violated the Equal Protection Clause under *Lindsey*. The court held that the penalty was discriminatory because it only applied to a small number of appellants without advancing the purported state interest of deterring frivolous appeals:

> Ultimately, the problem with the statute is that while it may deter a small number of frivolous appeals – though, more likely than not, these appeals would already be deterred by other provisions – it deters even more meritorious appeals. And, because it applies to such a narrow class. . . it violates *Lindsey's* command that an appeal right 'cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.'

Elk Horn Coal, 163 S.W.3d at 421 (quoting *Lindsey*, 405 U.S. at 77) (emphasis in original).

Lindsey and its progeny instruct that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the South Carolina and United States Constitutions. The statute imposes an appeal bond on one narrow class of appellant. Unlike nearly every other appellant, an unsuccessful CON applicant must post a substantial appeal bond to obtain judicial review of a lower decision. And although the appeal bond can be so substantial that it will deter frivolous appeals, it will similarly deter non-frivolous appeals. Moreover, the amount of bond is not rationally tied to any injury suffered by a successful respondent as a result of the appeal, because such respondent is automatically awarded the entire amount of the bond regardless of whether it suffered an injury. As a result, the bond requirement is not rationally related to any legitimate state interest, and even if it did, it would nevertheless be unconstitutional because it arbitrarily and irrationally imposes a penalty on unsuccessful CON appellants. Therefore, the Court

should rule that the bond requirement violates the Equal Protection Clauses and is invalid.

4. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Due Process Clause.

Article I, § 22 of the South Carolina Constitution establishes due process rights for persons appearing before administrative tribunals, such as the ALC. This section provides:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. art. I, § 22 (emphasis added). This provision is intended to serve "as a safeguard for the protection of liberty and property of citizens in recognition of the increasing governmental powers delegated to administrative agencies." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997).

In applying this provision, South Carolina appellate courts "have consistently indicated that the protections provided under [Article I, § 22] are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions." *South Carolina Ambulatory Surgery Ctr. Ass'n v. South Carolina Workers' Comp. Comm'n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010). Due process under this section requires "notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (emphasis added).

The bond requirement under S.C. Code Ann. § 44-7-220(B) constitutes a violation of CON appellants' due process rights because it significantly burdens their access to judicial review. Article I, § 22 of the South Carolina Constitution guarantees a person appealing from an administrative or quasi-administrative agency the right to judicial review without limitation in all instances. Section § 44-7-220(B) interferes with that right by requiring a substantial appeal bond as a pre-condition to any judicial review of a CON decision involving a competing applicant by the ALC. The bond requirement, thus, effectively prevents an unsuccessful CON applicant from appealing an adverse decision if it cannot afford the bond or does not want to risk the forfeiture of the bond – regardless of the merits of the prospective appeal. In other words, § 44-7-220(B) deters the exercise of the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution. Under § 44-7-220(B), there is no right to judicial review; rather, judicial review is a legislatively created privilege available only to those who are able and willing to purchase it. Therefore, that section's bond requirement constitutes an unconstitutional infringement on the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution, and it should be invalidated accordingly. *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (declaring constitutionally invalid fees and costs requirements that interfered with access to state judicial system).

B. This Court has the Inherent Authority To Grant a Supersedeas.

The Court should stay the judgment by exercising its equitable and discretionary power to grant a supersedeas under Rule 241(c), SCACR.

Rule 241(c) provides in pertinent part as follows:

> (1) In a case subject to an exception [of the automatic stay], any party may move for an order imposing a supersedeas of

> matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal.
>
> (2) In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot;
>
> (3) The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate.

The purpose of a supersedeas is to stay proceedings in order to preserve the *status quo* pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him. *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990), citing 4A C.J.S. *Appeal & Error* § 662 at 494-95, 497 (1957). As a rule, a supersedeas does not reverse, annul, or undo what has already been done, or impair the force of the judgment, order, or decision of a trial court - a supersedeas suspends a judgment but does not annul the judgment itself. *Id.* The "*status quo*" is defined in Black's Law Dictionary as, "the existing state of things at any given date."

Similarly, S.C. Code Ann. §1-23-380 of the Administrative Procedures Act ("APA"), which is entitled "Judicial review upon exhaustion of administrative remedies," permits the Court to order a stay of the judgment. This statute provides in pertinent part:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final

> decision in a contested case is entitled to judicial review pursuant to this article and Article 1.
>
> (2) Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. . . . The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.

Lastly, an equitable stay may also be invoked if justified by circumstances which outweigh any potential harm to the party against whom it operates. In making this determination, the court "must weigh competing interests and maintain an even balance." *Merritt Bros., Inc. v. Marine Midland Realty Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992) (citing *U.S. Central Building Supply, Inc. v. Wilke*, 685 F. Supp. 936, 938 (D. Md. 1988)); *see also Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

In this case, a stay is appropriate because any victory on appeal by Carolinas will be "hollow" if Piedmont has already pursued building a new hospital and eroded Carolinas' market share and patient base, with no accompanying remedy for Carolinas. Additionally, allowing Piedmont to construct a $100+ Million hospital and then cease operations if Piedmont does not prevail on appeal is inconsistent with the CON Act, which has a purpose to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services

which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." *See* S.C. Code Ann. § 44-7-120.

To the extent that the Court finds it appropriate to protect Piedmont from any delay caused by a stay should it prevail on appeal, it can exercise its inherent, equitable power to stay the judgment subject to the bond posted by Carolinas under § 44-7-220(B). In such case, the Court may use all or part of the existing bond to secure Piedmont's interest during the pendency of the appeal. If Piedmont ultimately prevails in this appeal, then the Court could award all or part of the bond to Piedmont to compensate it for any injury it suffered upon Piedmont's demonstration of such injury.

While there appears to have been no South Carolina case that has addressed this precise issue of whether such a bond is appropriate in these circumstances, a comparable case is *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161 (1946). In *Melton*, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the existence of an attachment bond as a remedy justifies the stay, even where the statutes do not address the issue expressly. The Supreme Court stated:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order. . . . The facts now before us do make the issue and we think that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right

> and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 335, 40 S.E.2d at 163.

For these reasons, the posting of a substantial cash bond by Carolinas justifies a stay of the ALC's Amended Final Order and any further action by the agency in reliance on that Amended Final Order. *See* Rule 241(c)(1), SCACR, *supra*.

V. CONCLUSION

For the foregoing reasons, Appellant Carolinas respectfully requests that the Court grant its Motion for Relief from Bond and Petition for Supersedeas Pending Resolution of the Appeals Process.

Respectfully submitted,

Douglas M. Muller
Trudy H. Robertson
E. Brandon Gaskins
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 Telephone
(843) 579-7099 Facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System

March 16, 2015
Charleston, South Carolina

VERIFICATION

Personally appeared before me, the undersigned, who being duly sworn, deposes and states under oath that he is the agent for the Appellant in the above-referenced action and that he has read the contents of the foregoing Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of the Appeal Process and that the matters contained therein are true to the best of his knowledge.

F. Del Murphy, Jr.
Senior Vice President
Planning & Development
CHS Management Company
Carolinas HealthCare System

Sworn to before me
This 13 day of March, 2015

Tameika Chappel
Notary Public for North Carolina
My Commission expires: 6/21/19

TAMEIKA CHAPPEL
Notary Public
Mecklenburg County
NORTH CAROLINA

EXHIBIT A

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 14 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Petitioner,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

NOTICE OF APPEAL

The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Appellant"), appeals the Final Order of the Honorable S. Phillip Lenski dated March 31, 2014 (the "Final Order") and the Amended Final Order dated December 15, 2014 (the "Amended Final Order"), which granted a Certificate of Need to Petitioner Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center and denied a Certificate of Need to Appellant. Appellant received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, Appellant timely filed a Motion to Alter or Amend the Final Order pursuant to Rule 29(d) of the Rules of

Procedure of the Administrative Law Court and Rule 59 of the South Carolina Rules of Civil Procedure. On May 2, 2014, the Honorable S. Phillip Lenski vacated the Final Order. On December 15, 2014, the Honorable S. Phillip Lenski issued the Amended Final Order.[1] Appellant received written notice of the entry of the Amended Final Order on December 15, 2014.

January 14, 2015

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

Other Counsel of Record:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley & Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Attorneys for Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201

Attorneys for the South Carolina Department of Health and Environmental Control

[1] The Final Order, the May 2, 2014 order vacating the Final Order, and the Amended Final Order are attached hereto as required by South Carolina Appellate Court Rule 203(d)(2)(B).

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 14 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Petitioners,

v.

South Carolina Department of Health and Environmental Control
And The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

PROOF OF SERVICE OF NOTICE OF APPEAL

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Notice of Appeal*** by hand delivery, addressed as follows:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley &
Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

January 14, 2015

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
And The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is the ..... Appellant.

PROOF OF SERVICE

This is to certify that on January 14, 2015 I served the Administrative Law Court in the foregoing matter with a copy of the ***Notice of Appeal*** by hand delivery, addressed as follows:

The Honorable Jana E. Shealy
Clerk, Administrative Law Court
Edgar Brown Building
1205 Pendleton Street, Suite 224
Columbia, SC 29201

RECEIVED
JAN 22 2015
SC Court of Appeals

Douglas M. Muller, Esquire (SC Bar #10277)
Trudy H. Robertson, Esquire (Bar #64856)
E. Brandon Gaskins, Esquire (Bar #73274)
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

January 20, 2015

Charleston, South Carolina

EXHIBIT B

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 16 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center .....Petitioner-Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

BOND

WHEREAS, Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Appellant") has filed a Notice of Appeal, effectively appealing the (1) Final Order of the Honorable S. Phillip Lenski dated March 31, 2014 (the "Final Order") and (2) Amended Final Order dated December 15, 2014 (the "Amended Final Order"). A copy of the Notice of Appeal (without Orders) is attached hereto as **Exhibit A**;

WHEREAS, the subject appeal seeks the reversal of the Administrative Law Court's decisions to grant a Certificate of Need to Petitioner Amisub of South Carolina,

Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center for a 100-bed hospital in Fort Mill, South Carolina, (the "Project") and to deny a Certificate of Need to Appellant; and

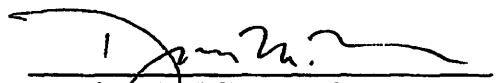
WHEREAS, pursuant to S.C. Code Ann. § 44-7-220(B), Appellant has paid unto the Office of the Clerk of the South Carolina Court of Appeals the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), in cash, said amount being the maximum amount payable by statute as the total cost of the Project is One Hundred and Nineteen Million Eight Hundred and Eight Thousand and Nine Hundred and Sixty-Four and no/100 Dollars ($119,808,964.00), as set forth in Paragraph 10 of the Findings of Fact in the Amended Final Order and as alleged by Petitioner-Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that Appellant is bound unto the Petitioner-Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center in the principal sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), to the extent this sum or any portion thereof may be determined to be due to the Petitioner-Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center upon final adjudication of Appellant's appeal. This cash bond is given pursuant to S.C. Code Ann. § 44-7-220(B) and shall be awarded or released only upon appropriate Order of the South Carolina Court of Appeals. Nothing contained in this Bond shall be deemed an admission of any liability on the part of the Appellant or waive Appellant's

right to seek relief from the provisions of S.C. Code Ann. § 44-7-220(B) or to challenge its validity.

Should the South Carolina Court of Appeals reverse, in whole or in part, the Final Order and Amended Final Order of the Administrative Law Court, then this cash bond shall be void and the cash returned to Appellant.

Respectfully submitted,



Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

January 16, 2015

Charleston, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center Petitioners, v. South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill, Respondents.	Docket No. 11-ALJ-07-0575-CC **RESPONDENT THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS MEDICAL CENTER-FORT MILL'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL AND MEMORANDUM IN SUPPORT**

Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this Motion to Stay/Supersedeas Pending Appeal pursuant to Rules 205 and 241(d) of the South Carolina Appellate Court Rules ("SCACR"), S.C. Code Ann. § 1-23-380(2) and Rule 65 of the South Carolina Rules of Civil Procedure ("SCRCP").

I. PROCEDURAL BACKGROUND

This Certificate of Need ("CON") contested case was initiated by Petitioner Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont") on November 15, 2011. After a hearing on the merits, this Court issued a Final Order dated March 31, 2014 (the "Final Order") which granted a CON to Piedmont and denied a CON to Carolinas. Carolinas received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, Carolinas timely filed a Motion to Alter or Amend the Final Order pursuant to Administrative Law Court ("ALC") Rule 29(d) and Rule 59, SCRCP. On May 2, 2014, this Court vacated the Final Order. On December 15, 2014, this Court issued an Amended

FILED

JAN 28 2015

SC ADMIN. LAW COURT

Final Order (the "Amended Final Order"). Carolinas received written notice of the entry of the Amended Final Order on December 15, 2014, and filed a Notice of Appeal (attached hereto as **Exhibit A**) with the South Carolina Court of Appeals on January 14, 2015. Carolinas subsequently filed a Cash Bond (attached hereto as **Exhibit B**) pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute as the total cost of Piedmont's hospital project is One Hundred and Nineteen Million Eight Hundred and Eight Thousand and Nine Hundred and Sixty-Four and no/100 Dollars ($119,808,964.00), as set forth in Paragraph 10 of the Findings of Fact in the Amended Final Order.

II. ARGUMENT

A. This Court has Jurisdiction to Consider the Motion to Stay/Supersedeas.

Under Rule 241, SCACR, a motion to stay must first be brought in the ALC, and the ALC must rule on it (or unreasonably delay its ruling) before the South Carolina Court of Appeals can consider it. Specifically, SCACR Rule 241(d) provides:

> (1) **Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.**
>
> (2) **After the lower court or administrative tribunal has ruled**, any party may petition the appellate court where the appeal is pending or an individual judge or justice for review of this order. The individual judge or justice may grant or deny the relief on a temporary basis, and refer the matter to the full appellate court to hear and determine the matter, or he or she may issue a final

> order. Upon the issuance of a final order by an individual judge or justice, an aggrieved party may petition the full appellate court for review of that decision....

(Emphasis added). Similarly, Rule 205, SCACR, states:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; **the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241**. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

(Emphasis added). Thus, both Rule 205 and Rule 241(d), SCACR, make it clear that the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances," such as the ALC's "unnecessary delay" in ruling on the motion.

B. Respondent Carolinas' Motion to Stay/Supersedeas Should be Granted.

1. A stay should be granted because Respondent Carolinas has posted a bond under S.C. Code Ann. § 44-7-220(B).

In adopting 2006 South Carolina Laws Act 387 (H.B. 3285) ("Act 387"), the South Carolina General Assembly streamlined judicial review of CON cases by providing for a direct appeal from the ALC to the South Carolina Court of Appeals without resort first to the Circuit Court. Although there had been a previous bond requirement for judicial review by the Circuit Court, the changes made by Act 387 did not clearly specify whether a bond was required in the Court of Appeals.

In July 2010, the South Carolina legislature enacted 2010 South Carolina Laws Act 278 (S.B. 337) ("Act 278"), which, among other things clarified the bond requirement for CON appeals. Specifically, Act 278 amended S.C. Code Ann. § 44-7-220(B) to provide in pertinent part as follows:

> If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application..., the party filing the appeal shall deposit a bond with the Clerk of the Court of Appeals within five calendar days after filing the petition to appeal. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application ... and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals.

In this case, because the statutory language applies the bond requirement to any party that is requesting appellate review of "the reversal of the Administrative Law Court's decision to approve the Certificate of Need application," and because Carolinas' application and Piedmont's application were "competing," a substantial bond in the maximum statutory amount is required to pursue an appeal.

This statutory procedure is silent on whether the posting of a bond will be accompanied by a stay of the underlying judgment, but the Administrative Procedures Act ("APA") recognizes that a stay may be granted "upon appropriate terms." *See* S.C. Code Ann. § 1-23-380(2). Further, the APA incorporates by reference Rule 65, SCRCP, which contains a bond requirement. *See* S.C. Code Ann. § 1-23-380(2); see also Rule 65(c), SCRCP ("no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained"). In this case, the posting of a substantial cash bond in the sum of $1,500,000.00 clearly constitutes

"appropriate terms," and the fact that the cash bond would be forfeited if Piedmont prevails on appeal more than protects Piedmont from any damages occasioned by the delay.

While there appears to have been no South Carolina case that has addressed this precise issue, a comparable case is *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161 (1946). In *Melton*, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the existence of an attachment bond as a remedy justifies the stay, even where the statutes do not address the issue expressly. The Supreme Court stated:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order. . . . The facts now before us do make the issue and we think that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 335, 40 S.E.2d at 163.

Here, Carolinas' rights and Piedmont's remedies would be similarly protected. Piedmont is protected by a substantial cash bond, justifying a stay. If a stay is not put in place, any victory on appeal by Carolinas will be "hollow" if Piedmont has already built a hospital and eroded Carolinas' market share and patient base, with no accompanying remedy for Carolinas (as explained further below). If the substantial bond is required without an accompanying stay, there

would be little reason for it, as there will have been no delay to Piedmont and no "damages" for which Piedmont should be entitled to recovery if it prevails on appeal.[1]

For these reasons, the posting of a substantial cash bond by Carolinas justifies a stay of this court's Amended Final Order and any further action by the agency in reliance on that Amended Final Order. *Cf.* Rule 65(c), SCRCP, *supra*.

2. In the alternative, an equitable stay should be granted under the circumstances.

In the alternative, the Court should stay the judgment by exercising its equitable power to stay under Rule 65, SCRCP, which is incorporated into the APA by S.C. Code Ann. § 1-23-380(2). Specifically, S.C. Code Ann. § 1-23-380(2) provides:

> Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision .... **The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.**

(Emphasis added). A preliminary injunction should issue under Rule 65 if necessary to preserve the *status quo ante*, and upon a showing by the moving party that: (i) without such relief it will suffer irreparable harm; (ii) it has a likelihood of success on the merits; and (iii) there is no adequate remedy at law. *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

Irreparable Harm and No Adequate Remedy at Law:

In the Amended Final Order, this Court found that Piedmont would increase its revenue by taking market share from Carolinas in Northern York County by the construction of a new hospital. Specifically, the Court stated:

[1] As noted in the statutory language recited above, S.C. Code Ann. § 44-7-220(B) also allows for a discretionary award of attorneys' fees and costs to the party whose project is on appeal.

> *Piedmont's projected market share assumes that with the presence of FMMC in Northern York County that it could return approximately to the share it had in 2003-2004. The only material differences in the historic and projected market shares are in the three zip codes in Northern York County where Piedmont historically has not had a large market share. With the location of FMMC in Northern York County, Piedmont assumed that would change, projecting shares comparable to the market share Piedmont has in the immediate area where it is located....*
>
> *Overall, Piedmont's market share assumptions are reasonable and achievable....*

(Amended Final Order, Findings of Fact 79, 81) (internal transcript citations omitted).

Inherent in that finding is that Carolinas will lose significant revenue in Northern York County if Piedmont is allowed to proceed in establishing its new hospital because Piedmont will take market share from Carolinas in an area where Piedmont's market share has historically been low and Carolinas' market share has been high. Carolinas will feel the same effects referenced by this Court in the Amended Final Order in terms of a change in referral patterns and a loss of patient base even prior to the construction of Piedmont's new hospital as Piedmont implements its strategy of recruiting new physicians and patients while it establishes a presence in Northern York County during the time that the hospital is being built (See Finding of Fact Nos. 25-26, 74 in the Amended Final Order).

While typically economic loss alone is not considered "irreparable harm," the cases that have addressed the issue have reached that conclusion because the injury can later be remedied by a damages award. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (internal quotation omitted)). This administrative case does not offer that option –

Carolinas cannot sue for the recovery of its lost revenue if it is successful on appeal, and in fact it has no remedy to restore this lost revenue. Under those circumstances, courts have concluded that economic loss coupled with the lack of a remedy constitutes "irreparable harm" justifying an injunction *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages . . . the court held that plaintiffs' injury was irreparable. We agree."). Here, there can be no compensation or monetary award - there is no way to compensate Carolinas for the revenue lost while Piedmont proceeds with its new hospital, and no adequate remedy at law. The lack of a remedy, coupled with the economic loss, results in irreparable harm to Carolinas if the injunction is not granted.

Likelihood of Success on the Merits:

In passing upon the "likelihood of success on the merits" in an application for an injunction, the court must satisfy itself, not that the movant certainly has the right, but that he has a fair question to raise as to the existence of such a right. *Williams v. Jones*, 92 S.C. 342, 348, 75 S.E. 705,710 (1912). It is well settled in South Carolina that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a *prima facie* showing has been made. *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969). When a *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate determination of the case on the merits. *Id.*

In this case, the Court of Appeals may reverse or modify the Amended Final Order if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law.

[cite]. Carolinas maintains and will contend in its appeal that the Amended Final Order should be reversed for a variety of reasons, most notably the following[2]:

Constitutional Argument – Carolinas contends that the Court applied the S.C. CON Act and regulations in a manner that violates the "as applied" dormant Commerce Clause of the U.S. Constitution by ruling in favor of an incumbent, South Carolina provider over a North Carolina-based provider and with the express purpose of interfering with the interstate commerce arising from the outmigration of patients from South Carolina to North Carolina, thereby repeating the mistakes made originally by DHEC in the prior review. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108-109, 705 S.E.2d 28, 38-39 (2011) (ALCs are empowered to hear "as applied" constitutional challenges to statutes and regulations).

Improper Application of Regulatory Criteria – Carolinas contends that the Court erroneously elevated the importance of "adverse impact" while simultaneously holding that it was the lowest-ranked of the review criteria.

Improper Admission of Evidence – Carolinas contends that the Court erroneously allowed and relied upon the testimony of three (3) Piedmont-affiliated physicians who had been

[2] Carolinas lists the following grounds for reversal as an illustration and the following list is not intended to be a full recitation of all grounds for appeal. Carolinas specifically reserves and does not waive the right to include other grounds for appeal which are not stated in this Motion.

subject to a Motion to Strike because they were belatedly identified just prior to trial and at the very end of discovery. Additionally, the Court relied upon unreliable hearsay testimony in finding that referral patterns and admissions practices of physicians apply to an analysis of hospital utilization and projected charity care.

Carolinas has presented a sufficient *prima facie* case to establish a likelihood of success on the merits under the standard, and to permit an injunction in the form of a stay of the judgment.

Other Equitable Relief:

An equitable stay may also be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court 'must weigh competing interests and maintain an even balance.' *Merritt Bros., Inc. v. Marine Midland Realty Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992) (citing *U.S. Central Building Supply, Inc. v. Wilke*, 685 F. Supp. 936, 938 (D. Md. 1988)); *see also Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."). Even if the Court finds that Carolinas' Motion to Stay/Supersedeas does not strictly meet the requirements outlined above, it can exercise its inherent, equitable power to stay the judgment given the fact that a substantial bond has been posted to protect Piedmont from any delay should it prevail on appeal.

III. CONCLUSION

The purpose of a supersedeas is to stay proceedings in order to preserve the *status quo* pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him. *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990), citing 4A C.J.S. *Appeal & Error* § 662 at 494-95, 497 (1957). As a rule, a supersedeas does not reverse, annul, or undo what has already been done, or impair the force of the judgment, order, or decision of a trial court - a supersedeas suspends a judgment but does not annul the judgment itself. *Id.* The "*status quo*" is defined in Black's Law Dictionary as, "the existing state of things at any given date." Here, the *status quo* should be preserved by staying the Amended Final Order and judgment pending Carolinas' appeal.

For the foregoing reasons, Respondent Carolinas respectfully requests that the Court grant it Motion to Stay/Supersedeas Pending Appeal.

Respectfully submitted,

Douglas M. Muller
Trudy H. Robertson
E. Brandon Gaskins
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 Telephone
(843) 579-7099 Facsimile

Attorneys for Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System

January 28, 2015
Charleston, South Carolina

VERIFICATION

Personally appeared before me, the undersigned, who being duly sworn, deposes and states under oath that he is the agent for the Respondent in the above-referenced action and that he has read the contents of the foregoing Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support and that the matters contained therein are true to the best of his knowledge.

F. Del Murphy, Jr.
Senior Vice President
Planning & Development
CHS Management Company
Carolinas HealthCare System

Sworn to before me
This 27 day of January, 2015

Tameika Chappel
Notary Public for North Carolina
My Commission expires: 6/21/19

TAMEIKA CHAPPEL
Notary Public
Mecklenburg County
NORTH CAROLINA

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center Petitioners, v. South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill, Respondents.	Docket No. 11-ALJ-07-0575-CC **CERTIFICATE OF SERVICE**

I hereby certify that I have, this 28 day of January 2015, served a copy of the foregoing ***Respondent The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System's Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support*** upon the following by electronic mail and by regular mail addressed to:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley & Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201-1708

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JAN 28 2015
SC ADMIN. LAW COURT

MOORE & VAN ALLEN PLLC

Heather Morin

EXHIBIT D

Certified to be a true and correct copy of the original record on file with the South Carolina Administrative Law Court

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER GRANTING MOTION TO STAY PENDING APPEAL**

This matter is before the court on an Application to Stay Pending Appeal filed by The Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill (Respondent) on January 28, 2015. The Respondent seeks to stay the December 15, 2015 Amended Final Order of the South Carolina Administrative Law Court ("ALC" or "court") granting the contested Certificate of Need (CON) to Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center (Petitioner) pending the outcome of the appeal filed by the Respondent in the South Carolina Court of Appeals. As of the date of this Order, the court has received no responsive pleadings from either the Petitioner or the Department.

This CON contested case was initiated by the Petitioner on November 15, 2011. After a hearing on the merits, this court issued a Final Order dated March 31, 2014 (Final Order) which granted a CON to the Petitioner and denied a CON to the Respondent. The Respondent received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, the Respondent timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, South Carolina Rules of Civil Procedure (SCRCP). On May 2, 2014, the court vacated the Final Order. On December 15, 2014, the court issued an Amended Final Order. The Respondent received written notice of the entry of the Amended Final Order on December 15,

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2014 and filed a Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015. The Respondent subsequently filed a cash bond, pursuant to S.C. Code Ann. § 44-7-220(B), with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute.

The ALC has jurisdiction to rule on the Respondent's Motion to Stay pursuant to Rule 241, South Carolina Appellate Court Rules (SCAPCR). Rule 241(d) provides:

> Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

Similarly, Rule 205, SCACR, provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Therefore, the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances." Pursuant to S.C. Code Ann. § 1-23-380(2), the ALC may grant a stay requested by a party "upon appropriate terms." Pursuant to S.C. Code Ann. § 44-7-220(B), a party seeking a reversal of the ALC's decision to approve a CON application must deposit a bond with the Clerk of the Court of Appeals up to a maximum of $1,500,000.00. Here, the Respondent has deposited the required bond pursuant to § 44-7-220(B).

There is no case law on point as to what constitutes "appropriate terms" forming the basis required to issue a stay in a CON case. However, in Melton v. Walker, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the

existence of an attachment bond as a remedy justifies that stay, even where the statutes do not address the issue expressly. 209 S.C. 330, 40 S.E.2d 161 (1946). The Supreme Court held:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order... The facts now before us do make the issue and we thing that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 355, 40 S.E.2d at 163.

Similarly, in this case, the Respondent's right to appeal would be hollow if the Petitioner were able to continue with its plans to build the hospital provided for in the CON. In that scenario, even if the Respondent were to prevail on appeal, a hospital serving the Fort Mill customer base would already be established by the Petitioner, therefore eroding the Respondent's market share and patient base with no adequate remedy available to the Respondent. Conversely, if the Respondent does not prevail on appeal, the Petitioner's rights have been preserved through the substantial bond posted by the Respondent. Accordingly, this court **GRANTS** the Respondent's Motion to Stay Pending Appeal.

AND IT IS SO ORDERED.

February 10, 2015
Columbia, South Carolina

S. Phillip Lenski
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 10, 2015
Columbia, South Carolina

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EXHIBIT E

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER VACATING THE COURT'S FEBRUARY 10, 2015 ORDER GRANTING MOTION TO STAY PENDING APPEAL**

On February 10, 2015, this court issued an Order Granting Motion to Stay Pending Appeal, granting the Motion to Stay/Supersedeas Pending Appeal of the Respondent, Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center – Fort Mill (Respondent) in the above captioned matter. At that time, the court was acting solely on the Respondent's motion and supporting memoranda, and was not in possession of any responsive pleadings filed by the Petitioner, Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center (Petitioner).

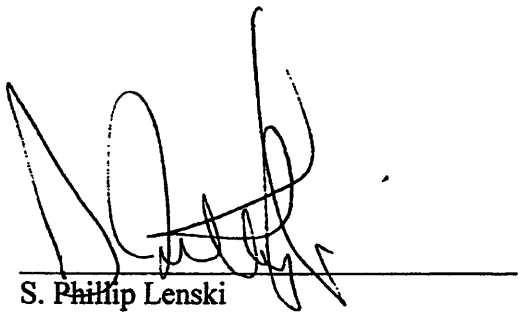
Subsequent to the issuance of its February 10, 2015 Order, the court became aware that the Petitioner had filed a responsive pleading in a timely manner, which was apparently misrouted to another judge on the Administrative Law Court. Additionally, the Respondent has now submitted a Reply Memorandum responding to Petitioner's Memorandum in Opposition. None of these pleadings were in the possession of or considered by the court when it issued its February 10, 2015 Order Granting Motion to Stay Pending Appeal. Therefore,

IT IS HEREBY ORDERED that this court's Order Granting Motion to Stay Pending Appeal, dated February 10, 2015, is hereby vacated pending the court's review of the Petitioner's

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Memorandum in Opposition and the Respondent's Reply Memorandum.

AND IT IS SO ORDERED.



S. ~~Phillip~~ Lenski
Administrative Law Judge

February 12, 2015

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CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 12, 2015
Columbia, South Carolina

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EXHIBIT F

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER DENYING RESPONDENT'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL**

This matter is before the court on the Respondent's, The Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill (Respondent or CHS), Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support filed on January 28, 2015. The Respondent seeks to stay the December 15, 2015 Amended Final Order of the South Carolina Administrative Law Court ("ALC" or "court") granting the contested Certificate of Need (CON) to Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center (Petitioner or Piedmont) pending the outcome of the appeal filed by the Respondent in the South Carolina Court of Appeals. The court issued an Order Granting Motion to Stay Pending Appeal on February 10, 2015. However, the court vacated that Order on February 12, 2015 when it became aware that responsive pleadings that had been submitted by the Petitioner, had been misrouted to another judge on the ALC and had not been considered when the court issued its February 10, 2015 Order. Having reviewed the Petitioner's Memorandum in Opposition to Respondent's Motion to Stay/Supersedeas Pending Appeal, as well as the Respondent's Reply Memorandum, the court denies the Respondent's Motion to Stay/Supersedeas Pending Appeal.

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This CON contested case was initiated by the Petitioner on November 15, 2011. After a hearing on the merits, this court issued a Final Order dated March 31, 2014 (Final Order) which granted a CON to the Petitioner and denied a CON to the Respondent. The Respondent received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, the Respondent timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, South Carolina Rules of Civil Procedure (SCRCP). On May 2, 2014, the court vacated the Final Order. On December 15, 2014, the court issued an Amended Final Order. The Respondent received written notice of the entry of the Amended Final Order on December 15, 2014 and filed a Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015. The Respondent subsequently filed a cash bond, pursuant to S.C. Code Ann. § 44-7-220(B), with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute.

JURISDICTION

The ALC has jurisdiction to rule on the Respondent's Motion to Stay pursuant to Rule 241, South Carolina Appellate Court Rules (SCAPCR). Rule 241(d) provides:

> Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

Similarly, Rule 205, SCACR, provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Therefore, the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances." Pursuant to S.C. Code Ann. § 1-23-380(2), the ALC may grant a stay requested by a party "upon appropriate terms." Pursuant to S.C. Code Ann. § 44-7-220(B), a party seeking a reversal of the ALC's decision to approve a CON application must deposit a bond with the Clerk of the Court of Appeals up to a maximum of $1,500,000.00. Here, the Respondent has deposited the required bond pursuant to § 44-7-220(B).

DISCUSSION

The Respondent argues that it this court should grant a stay as a result of posting the bond pursuant to S.C. Code Ann. §44-7-220(B) (Supp. 2012). Alternatively, the Respondent argues that an equitable stay should be granted pursuant to S.C. Code Ann. § 1-23-380(2) (Supp. 2013) regarding the ability of an agency or reviewing court to grant a stay pending appeal. The court will address each argument in turn.

S.C. Code Ann. § 44-7-220(B)

In its motion filed on January 28, 2015, the Respondent asserts that on January 14, 2015, it posted a cash bond with the Clerk of the South Carolina Court of Appeals in the amount of $1,500,000.00, which is the maximum amount payable pursuant to S.C. Code Ann. § 44-7-220(B). As acknowledged in the Respondent's motion, the statute is silent on whether the posting of a bond will be accompanied by a stay of the underlying judgment. The Respondent asks the court to adopt the rationale in Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946) and find that the posting of the bond justifies this court issuing a stay. However, the court finds this case unpersuasive. Furthermore, in a much more recent case, the South Carolina Court of Appeals addressed this exact issue and denied a party's request for a stay based on arguments similar to those proposed by the Respondent. In Grand Strand Regional Medical Center v. S.C. Department of Health and Environmental Control, App. Case No. 22014-000973 (S.C. Ct. App., Dec 16, 2014), the South Carolina Court of Appeals denied the petition for a stay of Carolina Regional Cancer Center (CRCC). In that case, two applicants (CRCC and Grand Strand Regional Medical Center) were seeking certificates of need to provide radiation therapy services in the Myrtle Beach area. The

Administrative Law Court ruled that the applications were not competing and approved both. CRCC appealed the decision to the Court of Appeals, posting a bond pursuant to S.C. Code Ann. §44-70220(B). CRCC then filed a petition for supersedeas to stay implementation of Grand Stand's radiation therapy project.

The Court of Appeals denied CRCC's petition. In its opinion, the Court of Appeals held:

> Appeals from administrative tribunals are exceptions to the automatic stay requirement of Rule 241(a) of the South Carolina Appellate Court Rules. Rule 241(b)(11), SCAR. However, a supersedeas may be ordered pursuant to Rule 241(c), SCAR. The rule provides that "[i]n determining whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCAR. We find there is no danger the court will lose jurisdiction or the issues on appeal become moot if Grand Strand is allowed to proceed with its project. See S.C. Ret. Sys. Inv. Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Grand Strand acknowledges it would have to cease operations at its facility if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

This court finds the holding in Grand Strand to be dispositive of this issue. The Court of Appeals will not lose jurisdiction of this matter irrespective of whether the Petitioner is permitted to begin construction of its facility. Furthermore, in its Motion in Opposition, the Petitioner acknowledges, as did Grand Strand, that it would have to cease operations at Fort Mill Medical Center if the Court of Appeals were to reverse this court's decision approving its CON.

Equitable Stay

In the alternative, the Respondent argues that this court should grant an equitable stay to the Respondent during the pendency of its appeal under S.C. Code Ann. § 1-23-380(2). Section 1-23-380(2) provides that "serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. . ." However, the ALC may, "upon appropriate terms," order a stay "upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.," Although the Respondent has not filed a petition under Rule 65, SCRCP, it argues that Rule 65 is incorporated into the Administrative Procedures Act (APA) by § 1-23-380(2) and that this court should issue a preliminary injunction to preserve the *status quo ante* and because

the Respondent (1) will suffer irreparable harm without such relief; (2) has a likelihood on the merits; and (3) there is no adequate remedy at law. Poynter Invs. V. Century Builders of Piedmont, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

1. Irreparable Harm

The Respondent asserts that it will lose significant revenue in Northern York County if the Petitioner is permitted to begin constructing its hospital because it will take market share from the Respondent. The court disagrees.

First, the court disagrees with the Respondent's assertion that it would lose market share to the Petitioner if the Petitioner were to be permitted to build its hospital. This court's decision to award the CON to the Petitioner was in part based on its finding that the Petitioner was consistently losing market share to the Respondent because of the Respondent's practices that ensured that patients seen by physicians within the Respondent's CPN network who needed hospital services were being referred exclusively to the Respondent's network of hospitals located outside of York County, and not to the Petitioner's existing hospital located within the county. Permitting the Respondent to build a hospital in Northern York County would accelerate the Petitioner's loss of market share, erode its payor mix, and would put at risk the quality of medical care available to York County residents, especially in the area of tertiary services, as the Respondent would continue to refer patients needing tertiary care to its out of county hospital network, and not to the Petitioner's Rock Hill hospital.

Additionally, the court finds it curious that the Respondent is now asserting that it will lose market share to the Petitioner if it is permitted to build its hospital in Northern York County. During the trial in this matter, it was the Respondent's position that its proposed Northern York County hospital's function would primarily be to relieve the high patient volume at its other hospitals and accommodate existing patients that were currently receiving care at those other CHS facilities outside of the county. The Respondent's position was that building its proposed hospital in Northern York County would allow it to manage its existing York County patient base better. Therefore, this court fails to understand how permitting the Petitioner to build its hospital will have any effect on the Respondent's existing market share which is currently being cared for at the Respondent's other hospitals.

Furthermore, even if the Respondent could establish that the construction of the Petitioner's hospital would cause some immediate economic loss, it would not rise to the level of

irreparable harm. Pure economic loss is generally insufficient to satisfy the irreparable harm prong of the test for obtaining a stay where an adequate remedy is available at law. Professional Wiring Installers, Inc. v. Sims, 2008 WL 9840409 (S.C. App. 2008) (Unpublished), citing MailSource, LLC v. M.A. Bailey and Associates, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The only exception to this general rule is when the economic loss would cause a complete loss of the business. Peck v. Spartanburg Regional Healthcare Systems, 3678 S.C. 450-455, 626 S.E.2d 34, 37 (Ct. App. 2005); Levine v. Spartanburg Regional Services District, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005); District of Columbia v. E. Trans-Waste of Maryland, Inc., 758 A.2d 1, 15 (D.C. 2000); Campbell Inns, Inc. v. Banholzer, Turnure and Company, 148 Vt. 1, 527 A.2d 1142, 1146 (1987). As was demonstrated at the hearing, the Respondent is a large hospital system with forty-two (42) hospitals and other healthcare facilities, as well as a significant physician network. The economic loss posed by the Petitioner's One Hundred (100) bed hospital in Northern York County cannot be said to threaten the existence of the Respondent's business, and therefore, cannot be said to pose irreparable harm to the Respondent.

Finally, any change in referral patterns that may occur because of the construction and operation of the Petitioner's hospital would revert to the Respondent if it is successful on appeal.

2. Likelihood of Success on the Merits

The court disagrees with the Respondent that it only needs to raise a fair question as to its likelihood of success on appeal. Both cases cited by the Respondent in support of its position, Transcontinental Gas Pipe Line Corporation v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969), and Williams v. Jones, 92 S.C. 342, 348, 75 S.E. 705, 710 (1912), involves preliminary injunctions issued by a court before the trial occurred. In those cases, the court held that simply a prima facie showing in the complaint was all that was required to establish the likelihood of success prong of the test for injunctive relief. The court finds the holdings in those cases to be inapplicable here, where this case was in litigation for years, was subjected to a fifteen day trial, and where the court issued a detailed Amended Final Order.

Furthermore, the court respectfully disagrees, for reasons set forth in its Amended Final Order, that the Respondent is likely to succeed in its appeal on any of the grounds set forth in its motion.

3. Adequate Remedy at Law

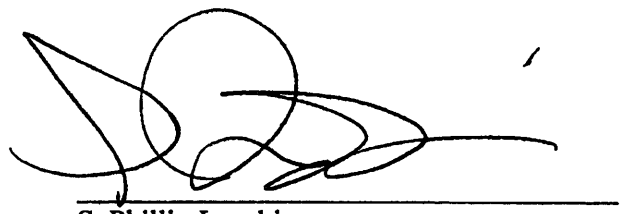
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The last prong of the test for obtaining a stay requires the party to demonstrate that it has no adequate remedy at law. The Respondent's Motion to Stay/Supersedeas Pending Appeal fails to establish this. The Respondent's remedy at law is the appeal it has already filed. If it prevails, then the Petitioner will be required to stop the construction or the operation of its hospital.

ORDER

IT IS THEREFORE ORDERED that the Respondent's Motion to Stay/Supersedeas Pending Appeal is **DENIED.**

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

February 20, 2015
Columbia, South Carolina

7 9 8 JES

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 20, 2015
Columbia, South Carolina

FILED
FEB 20 2015
SC ADMIN. LAW COURT

8 of 8 pgs

EXHIBIT G

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill, Respondent.	)	Civil Action No. 11-ALJ-07-0575-CC

PETITIONER'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL

I. INTRODUCTION

Petitioner Amisub of South Carolina, Inc. ("Piedmont") files this Memorandum in Opposition to Respondent Charlotte Mecklenburg Hospital Authority's ("CHS") Motion to Stay/Supersedeas ("CHS Motion").

A decade has passed since Piedmont first applied for a CON to build a hospital in Fort Mill. For a decade the citizens of the Fort Mill area have waited for a needed hospital. This process has involved two agency reviews, two lengthy trials, and now an appeal. In its current motion, CHS argues that it is entitled to stay Piedmont from proceeding with its project, even though Piedmont acknowledges that it would have to cease operations should CHS win on appeal.

II. ARGUMENT

A. S.C. Code §44-7-220(B) Does Not Authorize a Stay

CHS argues that because S.C. Code §44-7-220(B) required it to file an appeal bond, the implementation of Piedmont's hospital project must be stayed. The South Carolina Court of Appeals squarely rejected the same argument in a recent opinion. *Grand Strand Reg. Med. Ctr. v. S.C. Dep't of Health and Env. Control*, App. Case No. 2014-000973 (S.C. Ct. App., Dec. 16, 2014) (Ex. A); *see Grand Strand Reg. Med. Ctr. v. S.C.Dep't. of Health and Env. Control*, Docket No. 2012-ALJ-07-0090-CC (S.C. Admin. Law Ct., Sept. 26, 2014) (Ex. B).

Grand Strand involved two applications to provide radiation therapy services in Myrtle Beach. The applicants were Grand Strand Regional Medical Center ("Grand Strand") and Carolina Regional Cancer Center ("CRCC"). The Administrative Law Court ruled that the applications were not competing and approved both. CRCC appealed, posting a bond under S.C. Code Ann §44-7-220(B). Like CHS in the present case, CRCC filed a petition for supersedeas to stay implementation of Grand Strand's radiation therapy project.

The Court of Appeals denied CRCC's petition. The Court noted that although Rule 241(a), SCACR, generally requires an automatic stay upon appeal, an exception exists for appeals of ALC decisions under Rule 241(b)(11), SCACR. Ex. A at 2. Nevertheless, a supersedeas may be ordered pursuant to Rule 241(c), SCACR. *Id.* Rule 241(c) provides that "[i]n determining whether [a supersedeas] should issue . . . [the court] should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested case from becoming moot." The Court of Appeals found there was "no danger the court will lose jurisdiction or the issues on appeal will become moot if Grand Strand is allowed to proceed

with its project." Ex. A at 2, *citing S.C. Ret. Sup. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt.").

> Grand Strand acknowledges it would have to cease operations at its facility if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

Ex. A at 2.

Similarly, Piedmont acknowledges that it would have to cease operations at Fort Mill Medical Center if the Court of Appeals reverses the ALC's decision approving its CON. Just as in *Grand Strand,* Piedmont's proceeding with its project will neither moot issues on appeal nor strip the Court of Appeals of jurisdiction.

In *Grand Strand,* CRCC further argued that it would be adversely impacted and suffer "severe consequences" if Grand Strand were allowed to implement its project during the appeal. Ex. A at 2. Similarly, in the present case CHS argues that any victory it wins on appeal will be "'hollow' if Piedmont has already built a hospital and eroded [CHS's] market share and patient base. . . ." CHS Motion at 5. The Court of Appeals rejected CRCC's argument, just as this Court should reject CHS's.

> We do not believe the General Assembly drafted section 44-7-220(B) with the intent of protecting the losing party's competitive interests during a CON appeal. To the extent Grand Strand was wrongfully granted a CON, as Appellant asserts, this Court's ruling on the merits in Appellant's favor – not a stay – will protect Appellant's competitive interests.

Ex. A at 3.

Finally, CHS, like CRCC before it, argues simply that the bond it posted under S.C. Code §4407-220(B) requires a stay. "If the substantial bond is required without an accompanying stay, there would be little reason for it. . . ." CHS Motion at 5-6. As the Court of Appeals noted in *Grand Strand*, however, section 44-7-220(B) does not contain a stay provision, and "our rules of statutory construction do not allow courts to add language to statutes." Ex. A at 3, *citing Consumer Advocate for the State of S.C. v. S. C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012); *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E. 2d 321, 325 (1951). "Accordingly this court will not read into section 44-7-220(B) a requirement that supersedeas must be granted in exchange for Appellant posting a substantial bond." Ex. A at 3.[1]

B. <u>The Court Should Not Grant an Equitable Stay.</u>

In the alternative, CHS argues this Court should preliminarily enjoin Piedmont from starting work on its Fort Mill hospital during the appeal, pursuant to S.C. Code §1-23-380(2) and SCRCP 65. Section 1-23-380(1) of the South Carolina Administrative Procedures Act provides that "[p]roceedings for review are instituted by filing a petition . . . ." Section 1-23-380(2) then adds: "The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure."

Piedmont is unaware of any case in which Rule 65 has been applied to a petition for supersedeas, filed pursuant to SCACR 241(c), during the pendency of an appeal, following a

[1] The $1.5 million bond posted by CHS would be grossly insufficient to justify a stay against Piedmont proceeding with its project, the cost of which is estimated at $119,808,964 - $146,522-042. Am. Final Order, Finding of Fact 10, p.7.

final evidentiary hearing. Moreover, CHS has not filed a petition under Rule 65. *See* Ex. B at 3, 5 (noting that CRCC had not filed a Rule 65 petition). Rule 65(c) requires security "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Rule 65, in other words, requires a bond separate from the appeal bond in an appropriate amount. CHS has not filed a Rule 65 petition and has provided no support for its assertion that the appeal bond it paid is sufficient for purposes of Rule 65. In fact, the $1.5 million bond CHS has posted is grossly insufficient to cover Piedmont's costs and damages should a stay be imposed and Piedmont prevail on appeal.

Even if Rule 65 were to apply to a petition for supersedeas, one should not be granted to CHS. Issuance of a preliminary injunction requires the movant to demonstrate three criteria: irreparable harm, a likelihood of success on the merits, and no adequate remedy at law. *Poyntner Investments, Inc. v. Century Builders of Piedmont, Inc.* 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

1. **Irreparable Harm**

CHS contends that allowing Piedmont to build its hospital will cause CHS to "lose significant revenue in Northern York County." CHS Motion at 7, *citing* Am. Final Order, Findings of Fact 79, 81.

The Amended Final Order found that the establishment of Fort Mill Medical Center "could" restore Piedmont's market share in the Fort Mill area to what it had been in 2003-2004, before CHS changed its network physician strategies, which resulted in CHS taking significant market share from Piedmont. *Id.*, Findings of Fact 20-26, 79. It is unreasonable to believe, however, that the restoration of Piedmont's market share will occur overnight.

Even after the new hospital is constructed, it could take years for Piedmont to recapture the market share it lost to CHS from 2005-2012. *See id.*

Even if CHS could demonstrate that Fort Mill Medical Center were likely to cause it some immediate economic loss; such a loss would be insufficient to constitute irreparable harm. "Generally, pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate an adequate remedy is available at law." *Professional Wiring Installers, Inc. v. Sims*, 2008 WL 9840409 (S.C. App. 2008) (UNPUBLISHED), *citing MailSource, LLC v. M.A. Bailey & Assocs.* 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The exception to the general rule is that pure economic loss may constitute irreparable harm when it causes the "complete loss" of a business. *Peck v. Spartanburg Reg. Healthcare Syst.*, 367 S.C. 450-455, 626 S.E.2d 34, 37 (Ct. App. 2005) ("The complete loss of a professional practice can be an irreparable harm"); *Levine v. Spartanburg Reg. Servs. Dist.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) ("loss of . . . professional practice and career . . . can be an irreparable harm."); *Dist. of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt.1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement . . . .").

CHS is a public hospital system based in Charlotte that owns or manages 42 hospitals, in addition to various other healthcare facilities and a large physician network. Am. Final Order, Finding of Fact 4, 23. It is undisputed that CHS was doing well financially prior to 2005, when it began taking significant market share from Piedmont. It is undisputed that CHS

is doing well financially today. There is absolutely no risk that a 100-bed hospital in Fort Mill could threaten CHS's existence or, therefore, cause it irreparable harm.

Any change in referral patterns generated by operation of Fort Mill Medical Center would revert back if CHS were successful on appeal. *See* Ex. B at 5. It will take months for Piedmont even to build a hospital. If the Court imposes a stay and Piedmont prevails, months will be added to the time necessary for the appeals process, depriving citizens in the service area even longer of a new hospital. *See id.*

2. **Likelihood of Success on the Merits**

CHS cites *Williams v. Jones*, 92 S.C. 342, 348, 75 S.E. 705, 710 (1912) for the proposition that CHS need only raise a "fair question" as to its likelihood of success. It further cites *Transcontinental Gas Pipe Line Corp v. Porter*, 252 S.C. 478, 481, 167 S.E. 2d 313, 315 (1969) for the principle that simply a prima facie showing in the complaint of entitlement to injunctive relief is all that is required to show a likelihood of success. CHS Motion at 8.

Both *Williams* and *Transcontinental* involved preliminary injunctions issued by a trial court before a trial was held. At such an early stage of litigation, before any evidence has been submitted or even before any discovery has been conducted, it would be inappropriate for the court to consider the merits of the case. At that stage of litigation, the only way to demonstrate a likelihood of success is by establishing a prima facie case in the complaint.

That, however, is not the situation in the present case. A fifteen-day trial has been held, following years of litigation. This Court has issued a Final Order and an Amended Final Order. CHS asks the Court to don blinders and ignore the findings and conclusions of its 53-page Amended Final Order, which meticulously analyzes the merits of CHS's case and finds it lacking. CHS offers no authority to support its argument that in a petition for supersedeas in a

post-trial appeal, the likelihood of success on the merits should be analyzed by whether the Appellant established a prima facie case in its initial pleading.

CHS offers three principal issues on which it contends it will likely prevail on the merits: the dormant Commerce Clause, an allegedly improper application of the adverse impact regulatory criterion, and an allegedly improper admission of evidence.

a. **The Dormant Commerce Clause**

The Amended Final Order addresses CHS's dormant Commerce Clause argument in a lengthy footnote. *Id.* at 2, n.2. The Court observes that the same State Health Plan, project review criteria and analysis would have been used in the Amended Final Order "regardless of whether competing applicants were out-of-state or in-state providers." *Id.*

> In fact, the same plan, criterion and analysis have been applied in similar cases in which CHS has been awarded a CON in South Carolina. The decision of the court has been the result of an extended process commencing prior to 2006 when DHEC issued its first Decision. The court was permitted to make its own findings of fact by a preponderance based on the evidence presented. Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because CHS disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

Id.

b. **Application of the Adverse Impact Criterion**

Conclusions of Law 15-50 (pp. 44-52) of the Amended Final Order analyze how CHS and Piedmont comply with the relevant regulatory criteria. The Court concluded that of the 29 project review criteria identified by DHEC as most significant, the applicants complied equally

with eighteen,[2] Piedmont complied more fully than CHS with ten[3], and CHS complied more fully than Piedmont with none. The Court found that one criterion, 2(d), applied only to Piedmont and that Piedmont complied with it. Am. Final Order, Conclusions of Law 15-50, pp. 44-52. It is clear that Piedmont's application was superior to CHS's, even without taking adverse impact into account.

Of the priority criteria addressing adverse impact, the Court concluded that Piedmont better complied with 16(c), 22, and 23(a), but that both applicants complied equally with 23(b). CHS argues that the Court gave 16(c), 22, and 23(a) undue weight, along with 3(h), an adverse impact criterion not identified by DHEC in its March 27, 2006 letter as among those most significant. The Court squarely refuted this contention in the Amended Final Order:

> At trial, Piedmont's witnesses objected to DHEC's exclusion of Criteria 3h and the relative low ranking that DHEC gave Criteria 23a and 23b. S.C. Code Ann. §44-7-210(E) limits the issues to be considered at the contested case hearing to those presented to or considered by DHEC during the staff review and decision-making process. By failing to raise the issues related to the exclusion and importance of certain Project Review Criteria to DHEC prior to the contested case, Piedmont cannot raise these objections in the contested case. Accordingly, the court rejects Piedmont's arguments that DHEC erred in failing to consider Criterion 3h and in ranking Criteria 23a and 23b as among the least important criteria in its review. *As a result, the court will consider these criteria according to the ranking established by DHEC in its letter of March 27, 2006.* This does not require the court to ignore Criterion 3h but rather, that the court should give no greater weight to this criterion than it does to any of the other criteria that were not specifically listed in DHEC's ranking.

Amended Final Order, Conclusion of Law 31, pp. 47-48. (emphasis added).

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[2] The Court concluded that Piedmont and CHS equally complied with criteria 1, 3(a)(b)(c)(e) and (g), 4(a)(b)(c), 6(a)(b), 7, 9, 13(a)(b) and (d), 15, and 23(b).

[3] The Court concluded that Piedmont complied more fully than CHS with criteria 2(a)(b)(c) and (e), 3(f), 16(c), 17, 22, and 23(a).

In a footnote, the Court explains that any criteria not listed by DHEC in its March 27, 2006 letter, but nonetheless relevant – such as criterion 3(h) would be given equal importance. *Id.*, at 48, n. 14.

c. **Admission of Physician Testimony**

The third of the issues CHS considers most notable as grounds for reversal is the Court's admission of testimony from three physicians. The Court directly addressed this issue in the first footnote to its Amended Final Order.

> In their Petition for Rehearing as to the original Final Order and decision issued on March 31, 2014 and subsequently vacated on May 2, 2014, CHS argued that the three (3) physicians that testified were not "independent" as they were affiliated with Piedmont. The use of the word, "independent" has been removed. CHS also argues also argues that the court erred in allowing these physicians to testify at the contested case haring on the basis that they testified beyond the scope of their deposition testimony. The admission of testimony and the weight and credibility assigned to the same is within the purview of the court. The court does not believe that there was any abuse of discretion in allowing the admission of such testimony. Hill v S.C. Carolina Dept. of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010). CHS also had a full and fair opportunity to cross-examine these witnesses at the contested case hearing and did not request additional time to prepare for further examination during the course of the hearing.

Am. Final Order at 1, n.1.

3. **Adequate Remedy at Law**

CHS clearly has an adequate remedy at law – the appeal it has just filed. If CHS wins the appeal, Piedmont will have to cease development of its hospital project. The purpose of a temporary injunction is to preserve the status quo. *Peck*, 367 S.C. at 456, 626 S.E.2d at 37. If Piedmont ceases construction or operation of Fort Mill Medical Center, the status quo will be preserved.

III. CONCLUSION

CHS has delayed construction of a new hospital in Fort Mill for over a decade. Section 44-7-220(B) does not authorize or even suggest a stay. CHS has not filed a petition pursuant to SCRCP 65. To the extent Rule 65 applies to an appeal, CHS cannot show irreparable harm, since its only purported loss would be purely economic and could not come close to destroying its business. CHS cannot show a likelihood of success on the merits, all of which this Court has issued a final ruling on. CHS's appeal is an adequate remedy at law; since a victory would return matters to the status quo.

For all these reasons, CHS's motion should be denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Stuart M. Andrews, Jr.
stuart.andrews@nelsonmullins.com
Daniel J. Westbrook
dan.westbrook@nelsonmullins.com
1320 Main Street, 17th Floor
Post Office Box 11070
Columbia, SC 29201
(803) 799-2000

Attorneys for Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center

Columbia, South Carolina

Feb. 9, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center .....Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

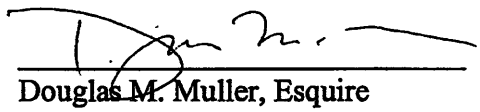
PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Appellant's Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process*** by overnight mail with proper postage affixed, addressed as follows:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley &
Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

RECEIVED
MAR 17 2015
SC Court of Appeals

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201



Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

March 16, 2015

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center .....Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF AND AMENDMENT OF MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS PENDING FINAL RESOLUTION OF APPEALS PROCESS

Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this Supplemental Brief and Amendment of Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of the Appeals Process filed with the Court on March 17, 2015, in accordance with the Court's Order of March 19, 2015, which directed that any amendment of the pending Motion be filed no later than ten (10) days from the date of the Court's Order .

I. *GRAND STRAND* DECISION

In *Grand Strand Regional Medical Center v. South Carolina Dept. of Health and Environmental Control*, App. Case No. 2014-000973 (S.C. Ct. App. March 19, 2015), a three-judge panel denied a Petition for Supersedeas filed by appellant Carolina Regional Cancer Center ("CRCC"). As grounds for this denial, the panel found as follows:

1. Because the language of S.C. Code Ann. § 44-7-220(B) does not reference a stay, the Court cannot add language omitted by the legislature to impose a stay.

2. Supersedeas under Rule 241(c), SCACR, is not warranted because the absence of a stay is not required to preserve the Court's jurisdiction or prevent mootness.

3. If no stay is imposed, CRCC will not suffer irreparable harm because "this court will likely decide the merits of the appeal before the completion of Grand Strand's project and thus, well before area doctors begin to change their referral patterns."

4. If no stay is imposed, S.C. Code Ann. § 44-7-220(B) is not rendered unconstitutional under concepts of the right to judicial review (S.C. Constitution Art. 1, Sec. 22) or procedural due process because CRCC successfully initiated the appeal and was able to afford the appeal bond required by the statute.

5. If no stay is imposed, S.C. Code Ann. § 44-7-220(B) is not rendered unconstitutional under concepts of equal protection or substantive due process because the statute bears a "reasonable relation" and a "rational basis" to a legitimate government purpose of "reserve[ing] some funds to compensate a respondent harmed by the delay of its approved project during the pendency of an appeal."

II. DISTINGUISHING FACTS FROM *GRAND STRAND*

The following facts are different and distinguish this case from the underlying facts in *Grand Strand*:

1. Unlike CRCC in *Grand Strand*, Carolinas makes a facial challenge to the constitutionality of the bond requirement and asks for a stay/supersedeas under Rule 241(c), SCACR, independent of whether the bond requirement is constitutional.

2. In order to pursue its appeal as required by S.C. Code Ann. § 44-7-220(B), Carolinas posted a bond in the maximum amount ($1,500,000) required by the statute, which is over three times higher than the bond posted by CRCC in *Grand Strand.*

3. In the underlying contested case hearing here, DHEC's decision to award a CON to Carolinas and to deny a CON to Piedmont was reversed by the ALC, and so only one party, Piedmont, is now entitled to a CON because Carolinas and Piedmont were deemed to be competing applicants. In the *Grand Strand* case, both CRCC and Grand Strand were awarded CONs because they were deemed "not competing" by the ALC, and CRCC was not denied a CON.

4. In the underlying decision here, the ALC determined that Piedmont's hospital utilization had declined as the result of an early change in physician referral patterns based on Carolinas' plans to build a hospital in Fort Mill, well before any hospital was actually built. (See Finding of Fact Nos. 25-26 in the Amended Final Order). The ALC further found that Piedmont would reverse this trend and capture market share in Northern York County if it establishes a new hospital, where its traditional market share has been lower. (See Finding of Fact No.74 in the Amended Final Order). In *Grand*

Strand, this Court determined that the physician referral patterns would not change until after the project was completed.

III. SUPPLEMENTAL LEGAL ARGUMENT

Carolinas' facial challenge to the constitutionality of the bond requirement under S.C. Code Ann. § 44-7-220(B) raises different arguments and relies upon different authority than CRCC's petition for supersedeas in *Grand Strand*. While CRCC did advance an interpretation of the bond requirement to avoid an unconstitutional result if no stay was granted, Carolinas makes a direct challenge to the bond requirement's constitutionality regardless of whether a stay is granted. And although CRCC made its arguments under the principles of equal protection, due process, and separation of powers, Carolinas' arguments against the constitutionality of the bond requirement under the same principles raise issues that were not addressed by the Court in its Order, which are addressed below.

A. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional.

1. The Bond Requirement is a Violation of the Separation of Powers Doctrine.

Unlike CRCC, Carolinas argues that the bond requirement under § 44-7-220(B) violates the separation of powers doctrine because it conflicts with existing rules of appellate procedure promulgated by the South Carolina Supreme Court. In contrast, CRCC argued that imposing a bond requirement without a stay violated the separation of powers doctrine because the legislature was attempting to deter CON appeals and thereby make the ALC the final arbiter in CON decisions. To be clear, Carolinas does not make this argument. As detailed below, Carolinas argues that the General Assembly cannot promulgate rules of judicial practice and procedure that conflict with existing rules

promulgated by the judiciary. The Court did not address this argument in *Grand Strand*, and for the reasons discussed below, the Court should reconsider its analysis under the separation of powers doctrine.

As stated in Appellant's Motion and Petition, the South Carolina Supreme Court has promulgated rules governing appellate procedures for an appeal from an administrative tribunal, such as this case, and § 44-7-220(B) interferes with these rules by mandating certain actions required to perfect an appeal. Specifically, Rules 203(b)(6), (d)(2), and (e)(2), SCACR, prescribe the method for a party to appeal a CON decision from the ALC. The procedure and manner for perfecting an appeal from the ALC under Rule 203 do not require an appellant to file a bond for this Court to exercise jurisdiction over a CON appeal.

In contrast, § 44-7-220(B) requires an appellant from a CON decision involving a competing applicant to deposit a bond with the Court of Appeals of an amount equal to five percent of the total project cost, up to a maximum of $1.5 million, within five calendar days of filing the petition to appeal. Under § 44-7-220(B), the Court of Appeals does not have jurisdiction over a CON appeal involving a competing applicant unless the required appeal bond is posted within the statutory deadline. In effect, the bond requirement limits the jurisdiction of the Court of Appeals in such cases by creating a barrier to appeal that does not exist under the South Carolina Appellate Court Rules, as promulgated by the South Carolina Supreme Court.

The South Carolina Supreme Court has also established the procedure governing appeal bonds in Rule 241, SCACR. Under Rule 241(c), the appellate court has considerable discretion to determine whether an appeal bond is appropriate and, if so,

what the terms, conditions, and amount of such bond should be. In contrast to the discretionary nature of an appeal bond under Rule 241(c), § 44-7-220(B) mandates with no exceptions that a party filing an appeal from a ALC decision denying a CON application involving a competing applicant must file a bond of up to a maximum of $1.5 million dollars. The appeal bond is required regardless of whether a stay or supersedeas is imposed. Moreover, the respondent is entitled to an award of all of the bond if it prevails on the appeal regardless of whether and to what extent it suffers any harm or damages as a result of the appeal. The mandatory forfeiture of the entire bond by an unsuccessful appellant serves as a penalty for filing an appeal. In other circumstances, our courts have found similar statutes that limit the court's authority invalid. *See Rutherford v. Rutherford*, 307 S.C. 199, 414 S.E.2d 157 (1992) (invalidating statute that limited Supreme Court's appellate scope of review in family court cases because judiciary – not legislature – had authority to make rules for the court's practice and procedure).

Notably, the mandatory nature of the award of the bond and the lack of a discretionary apportionment of costs under the bond were not in previous versions of the statute, but were added in 2010. Originally, 1990 South Carolina Laws Act 471 (S.B. 927) ("Act 471") imposed a discretionary, not mandatory, award of the bond amount to the respondent if judicial review was unsuccessful. Act 471 provided in pertinent part:

> If the court affirms the decision of the board or dismisses the appeal, the court **may award** to the applicant approved for the Certificate of Need who is a party to the appeal **all or a portion of the bond** and may award reasonable attorney's fees and costs incurred in the appeal. (Emphasis added).

By contrast, when the South Carolina legislature enacted 2010 South Carolina Laws Act 278 (S.B. 337) ("Act 278"), the bond language of S.C. Code Ann. § 44-7-220(B) was changed to the following:

> If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals **shall award** to the party whose project is the subject of the appeal **all of the bond** and also may award reasonable attorney's fees and costs incurred in the appeal.

(Emphasis added).

Although South Carolina courts have not addressed the specific issue, the most notable decision from another jurisdiction voiding a similar bond or penalty requirement is *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005). In *Elk Horn Coal*, the statute required a party appealing a judgment for the collection of money that had been stayed pending the appeal to pay a penalty of ten percent of the judgment to the prevailing party if the appeal was unsuccessful. Recognizing it had established rules to deter frivolous discretionary appeals, the Kentucky Supreme Court found that the penalty imposed on an unsuccessful appellant under the statute involved in that case "deters discretionary review motions – both frivolous and meritorious – and it thereby limits or restricts the Kentucky Supreme Court in exercising its jurisdiction to review cases from lower courts." *Id.* at 424. Accordingly, the *Elk Horn Coal* court held that the statutory appeal penalty invaded the Kentucky Supreme Court's exclusive power to prescribe its own rules for exercising appellate jurisdiction. *Id.*

Similarly, the Illinois Court of Appeals invalidated a statutory method for perfecting an appeal from an administrative decision that conflicted with the Illinois Supreme Court's rules for appellate procedure under the separation of powers doctrine in

Consumers Gas Co. v. Illinois Commerce Com., 144 Ill. App. 3d 229, 493 N.E.2d 1148 (1986). In that case, the court held that the separation of powers doctrine "prohibited [the legislature] from establishing procedures for obtaining an appeal bond from an administrative decision where a supreme court rule is already in place for that purpose." *Id.* at 237, 493 N.E.2d at 1153. *Elk Horn Coal* and *Consumer Gas Co.* both support the conclusion that the legislature's adoption of the bond requirement in § 44-7-220(B) constitutes an unconstitutional violation of the separation of powers doctrine.

Very simply, the bond requirement under § 44-7-220(B) violates the separation of powers doctrine by encroaching upon the judiciary's exclusive authority to promulgate rules of appellate practice and procedure. The bond requirement conflicts with the Supreme Court's rule for perfecting an appeal from an administrative tribunal by requiring a substantial appeal bond that deters appeals from a CON decision involving a competing applicant, thereby limiting the Court of Appeals' ability to review such cases. Moreover, the mandatory bond requirement conflicts with the rule for appeal bonds by limiting the Court of Appeals' inherent discretion to determine the appropriate terms and conditions of an appeal bond. Therefore, the Court of Appeals should invalidate the bond requirement under § 44-7-220(B) as an unconstitutional violation of the separation of powers doctrine.

2. <u>The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Equal Protection Clause.</u>

Like CRCC, Carolinas argues that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the United States and South Carolina Constitutions, but its argument is fundamentally different than CRCC's argument. CRCC argued that the bond requirement violates the Equal Protection Clauses because "it

is an absolute bar to judicial review for appellants who cannot afford the substantial bond requirement and is a taking without any rational relation to the purposes of the CON Act." In this case, though, Carolinas argues that the bond requirement violates the Equal Protection Clauses because it treats CON appellants differently than other appellants without being rationally related to the governmental purpose that it seeks to promote. In other words, Carolinas submits that the bond requirement's unconstitutionality under the Equal Protection Clauses does not arise from the fact that it could serve as a bar to those who cannot afford an appeal but because it treats a narrow class of appellants unequally.

As discussed further below, this is an important distinction. In *Lindsey v. Normet*, 405 U.S. 56 (1971), the United States Supreme Court recognized the unconstitutionality of different bond requirements for narrow classes of appellants under the Equal Protection Clause. It does not appear that CRCC raised the equal protection principles underlying the *Lindsey* decision or that the Court considered them. As a result, the Court should reconsider whether § 44-7-220(B) violates the Equal Protection Clauses in light of *Lindsey* and its progeny.

Section 44-7-220(B) imposes on appellants of an adverse CON decision involving competing applicants a substantial appeal bond that is not imposed on any other appellant. In this case, the bond requirement is particularly onerous on Carolinas because the underlying administrative agency, DHEC, finally awarded the CON to Carolinas after a multi-year legal battle, only to have the ALC reverse that decision and award the CON to Piedmont. Moreover, § 44-7-220(B) mandates that the entire bond be forfeited to the respondent if the appellant is unsuccessful regardless of the merits of the appeal or the damage suffered by the respondent as a result of the appeal. Thus, the bond requirement

operates as a penalty, imposes a substantial burden on unsuccessful CON appellants, and is unlike any appeal requirement imposed on other unsuccessful appellants in South Carolina courts.

Similar statutory bond penalties have routinely been held to violate the Equal Protection Clauses. In *Lindsey*, the United States Supreme Court invalidated an Oregon law that imposed a double bond on tenants bringing an appeal under the state's Forcible Entry and Wrongful Detainer ("FED") statute. This law required a tenant appealing an adverse decision under the FED statute to post a bond for twice the amount of rent during the pendency of the appeal, which was automatically forfeited to the landlord without proof of actual damage. *Id.* at 75. The purpose of the double bond was to deter frivolous appeals. *Id.* The U.S. Supreme Court ruled that the double bond was unconstitutional under the Equal Protection Clause because no other appellant was subject to the automatic assessment of unproved damages. *Id.* at 77-78. Although the Court acknowledged that rules to safeguard litigated property and discourage insubstantial appeals are legitimate state interests, it concluded that the double bond was not rationally related to either of those purposes because it was automatically forfeited and not limited to costs incurred or damaged suffered by the prevailing respondent. *Id.*

In another case, *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), the Ninth Circuit Court of Appeals invalidated a double-bond requirement under the federal Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(a). Although the court recognized that the statute was intended to deter frivolous appeals, it refused to uphold the requirement, observing that "*Lindsey* expressly held that there is no

rational relationship between this admittedly legitimate purpose and a double bond requirement." *O'Day*, 536 F.2d at 860.

And in *Elk Horn Coal*, the Kentucky Supreme Court not only invalidated the subject appeal penalty under the separation of powers doctrine, it also ruled that the penalty violated the Equal Protection Clause under *Lindsey*. *See Elk Horn Coal*, 163 S.W.3d at 421 (quoting *Lindsey*, 405 U.S. at 77). In so doing, the court, quoting directly from *Lindsey*, held that procedural provisions that do not discriminate between frivolous and non-frivolous appeals are arbitrary and irrational. *Elk Horn*, 163 S.W. 2d at 421-22.

The reasoning underlying these cases applies just as forcefully in this case even if the legislature's purpose in enacting the bond requirement under § 44-7-220(B) is legitimate as the Court found in *Grand Strand*. The Court in *Grand Strand* described the legitimate governmental purpose of § 44-7-220(B) as intending "to preserve some funds to compensate a respondent harmed by the delay of its approved project during the pendency of an appeal," but that purpose is defeated when the funds are automatically awarded to the successful respondent without bearing any rational relationship to the harm actually sustained. In other words, the forfeiture of the bond is not reasonably tailored to promote the purpose of compensating for harm resulting from delay if it automatically compensates a successful appellant even in the absence of any harm. As a result, *Lindsey* and its progeny instruct that the bond requirement under § 44-7-220(B) violates the Equal Protection Clauses of the South Carolina and United States Constitutions.

Moreover, even if the bond requirement's purpose of reserving funds to compensate a respondent for delay caused by an appeal is legitimate, it nevertheless

violates the Equal Protection Clauses because it is not rationally related to that purpose by virtue that it discriminatorily applies to only a narrow class of appellants - CON appellants in cases involving competing applicants. CON appellants involved in competing applicant cases are not unique from other appellants insofar as they may suffer harm from the delay caused by an appeal, but they are the only appellants that are required to post a mandatory bond that is automatically forfeited. The Equal Protection Clauses, however, do not permit this type of discrimination. As the Supreme Court stated in *Lindsey*, "reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals" are permissible as long as "these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, 405 U.S. at 78 (emphasis added). *See also, Elk Horn Coal*, 163 S.W.3d at 421 ("Distinguishing between defendant money judgment creditors and other money judgment creditors, or judgment creditors, the value whose judgments can be quantified, is arbitrary and capricious. As such, by focusing on such a narrow class, the statute is the sort of arbitrary statutes covered by *Lindsey's* understanding of 'rational basis.'") As the bond requirement under § 44-7-220(B) is neither reasonably tailored to compensate litigants from harm caused by the delay of an appeal nor nondiscriminatorily applied to all appellants, it violates the Equal Protection Clauses.

3. A Party's Ability to Afford the Bond Does Not Alter the Constitutional Analysis.

In *Grand Strand*, the Court found that the refusal to implement a stay did not render the bond requirement unconstitutional, in part, because of CRCC's ability to "afford" the appeal bond, thereby suggesting that a litigant's right to challenge the constitutionality of a statute may depend upon its economic status. Carolinas respectfully

submits that a party's ability to afford an appeal bond does not preclude or resolve a constitutional challenge to such a bond.

The Supreme Court's decision in *Lindsey* indicates that a party's ability to afford the bond and thereby seek judicial review does not affect the analysis of whether the bond requirement is unconstitutional under Equal Protection or the separation of powers doctrine. Although the Court noted in *Lindsey* that the double bond invalidated in that case was discriminatory against the poor because they could not post the double-bond, the Court made clear that the unconstitutionality of the bond was not premised solely on its effects on those who could not afford to post it. Significantly, the Supreme Court made clear that the double-bond statute was no less discriminatory because it also applied to nonindigent parties. According to the Court, the "nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon." *Lindsey*, 405 U.S. at 79.

Similarly, in *Elk Horn Coal*, the Kentucky Supreme Court's analysis of whether the penalty involved in that case violated the separation of powers doctrine was not affected by the fact that the appellant paid the penalty to the respondent prior to challenging the constitutionality of the penalty in the appellate courts. Rather, the court's decision was driven by whether the legislature's adoption of an appeal penalty interfered with the judiciary's authority to prescribe rules of practice and procedure. *Id.* at 423. Although the appeal penalty did not have the effect of denying the appellant its right to judicial review in that case, the court nevertheless recognized that the appeal penalty interfered with the appellate courts' ability to exercise its jurisdiction to review cases from lower courts. *Id.* at 424.

Therefore, the fact that Carolinas posted the bond in this case should not be a factor in deciding whether § 44-7-220(B)'s bond requirement is unconstitutional.

4. The Bond Requirement of S.C. Code Ann. § 44-7-220(B) is Unconstitutional as a Violation of the Due Process Clause and the Right to Judicial Review.

Article I, § 22 of the South Carolina Constitution establishes due process rights for persons appearing before administrative tribunals, such as the ALC. In applying this provision, South Carolina appellate courts "have consistently indicated that the protections provided under [Article I, § 22] are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions." *South Carolina Ambulatory Surgery Ctr. Ass'n v. South Carolina Workers' Comp. Comm'n*, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010). Due process under this section requires "notice, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (Emphasis added).

Section § 44-7-220(B) interferes with the right to judicial review and due process by requiring a substantial appeal bond as a pre-condition to any judicial review of a CON decision involving a competing applicant by the ALC. Under § 44-7-220(B), there is no right to judicial review; rather, judicial review is a legislatively created privilege available only to those who are able to afford posting the bond and the risk of losing the money. Although Carolinas posted the bond in this case, it cannot be denied that posting a $1.5 million bond significantly burdens its right to judicial review. Furthermore, the bond requirement will certainly deter other applicants who cannot afford the bond from seeking judicial review. Therefore, that section's bond requirement constitutes an

unconstitutional infringement on the right to judicial review guaranteed by Article I, § 22 of the South Carolina Constitution, and it should be invalidated accordingly.

B. This Court has the Inherent Authority to Grant a Supersedeas.

The Court should stay the judgment by exercising its equitable and discretionary power to grant a supersedeas. The purpose of a supersedeas is to stay proceedings in order to preserve the *status quo* pending the determination of the appeal and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him. *Graham v. Graham*, 301 S.C. 128, 390 S.E.2d 469 (Ct. App. 1990), citing 4A C.J.S. *Appeal & Error* § 662 at 494-95, 497 (1957). As a rule, a supersedeas does not reverse, annul, or undo what has already been done, or impair the force of the judgment, order, or decision of a trial court - a supersedeas suspends a judgment but does not annul the judgment itself. *Id.* The "*status quo*" is defined in Black's Law Dictionary as, "the existing state of things at any given date." In making this determination, the court "must weigh competing interests and maintain an even balance." *Merritt Bros., Inc. v. Marine Midland Realty Corp.*, 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992) (citing *U.S. Central Building Supply, Inc. v. Wilke*, 685 F. Supp. 936, 938 (D. Md. 1988)).

Here, the Court may exercise its equitable power to stay under Rule 65, SCRCP, which is incorporated into the APA by S.C. Code Ann. § 1-23-380(2). Specifically, S.C. Code Ann. § 1-23-380(2) provides:

> Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision .... **The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.**

(Emphasis added.)

A preliminary injunction should issue under Rule 65 if necessary to preserve the *status quo ante*, and upon a showing by the moving party that: (i) without such relief it will suffer irreparable harm; (ii) it has a likelihood of success on the merits; and (iii) there is no adequate remedy at law. *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

Irreparable Harm and No Adequate Remedy at Law:

In the Amended Final Order, the ALC found that Piedmont's utilization had declined as the result of a change in physician referral patterns precipitated by Carolinas' intent to build a new hospital. (See Finding of Fact Nos. 25-26 in the Amended Final Order). Here, Carolinas will feel the same effects referenced by the ALC in the Amended Final Order in terms of a change in referral patterns and lost patients prior to the construction of Piedmont's new hospital as Piedmont implements its strategy of recruiting new physicians and patients while it establishes a presence in Northern York County as it builds its hospital. (See Finding of Fact No. 74 in the Amended Final Order.)

While typically economic loss alone is not considered "irreparable harm," the cases that have addressed the issue have reached that conclusion because the injury can later be remedied by a damages award. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." (internal quotation omitted)).

This administrative case does not offer that option because Carolinas cannot sue for the recovery of its lost revenue if it is successful on appeal. In fact, it has no remedy

to restore this lost revenue. Under these circumstances, courts have concluded that economic loss coupled with the lack of a remedy constitutes "irreparable harm" justifying an injunction. *See Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages . . . the court held that plaintiffs' injury was irreparable. We agree."). Here, there can be no compensation or monetary award. There is no way to compensate Carolinas for the revenue lost while Piedmont proceeds with its new hospital, and no adequate remedy at law. The lack of a remedy, coupled with the economic loss, results in irreparable harm to Carolinas if the injunction is not granted.

Likelihood of Success on the Merits:

In passing upon the "likelihood of success on the merits" in an application for an injunction, the court must satisfy itself, not that the movant certainly has the right, but that he has a fair question to raise as to the existence of such a right. *Williams v. Jones*, 92 S.C. 342, 348, 75 S.E. 705,710 (1912). It is well settled in South Carolina that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except insofar as they may enable the court to determine whether a *prima facie* showing has been made. *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969). When a *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate determination of the case on the merits. *Id.*

In this case, the Court of Appeals may reverse or modify the Amended Final Order if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are in violation of

constitutional or statutory provisions; in excess of the statutory authority of the agency; or made upon unlawful procedure. *See* S.C. Code Ann. § 1-23-380(5).

Carolinas maintains and will contend in its appeal that the Amended Final Order should be reversed for a variety of reasons, most notably the following: (1) Carolinas contends that the ALC applied the CON Act and regulations in a manner that violates the "as applied" dormant Commerce Clause of the U.S. Constitution by ruling in favor of an incumbent, South Carolina provider over a North Carolina-based provider and with the express purpose of interfering with the interstate commerce arising from the outmigration of patients from South Carolina to North Carolina, thereby repeating the mistakes made originally by DHEC in its original review in 2005. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 108-109, 705 S.E.2d 28, 38-39 (2011) (ALCs are empowered to hear "as applied" constitutional challenges to statutes and regulations); and (2) Carolinas further contends that the ALC erroneously applied "adverse impact" review criteria by elevating it and failing to balance it with other review criteria. Carolinas has presented a sufficient *prima facie* case to establish a likelihood of success on the merits under the standard, which supports an injunction in the form of a stay of the judgment.

Alternatively, the Court may stay the judgment by exercising its power under Rule 241, SCACR, as previously described. Notably, Rule 241(c) states that the Court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot," but the Rule does not make this an exclusive list. Otherwise, the rule would be written as "shall only consider."

While there appears to have been no South Carolina case that addresses this precise issue of whether a stay is appropriate in these circumstances, a comparable case is

Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946). In *Melton*, the South Carolina Supreme Court addressed whether an appeal from an attachment stays the underlying proceedings when the South Carolina Code is silent on such a stay and concluded that the existence of an attachment bond as a remedy justifies the stay, even where the statutes do not address the issue expressly. The Supreme Court stated:

> Apparently this court has not heretofore had to solve the precise problem now presented, to wit, whether appeal from an order dissolving an attachment stays proceedings upon the order. . . . The facts now before us do make the issue and we think that the code contemplates that the appeal stays dissolution of the attachment until it is decided, dismissed or abandoned. The immediately apparent hardship upon the defendant is not real because he had his remedy for release of the property by the filing of a replevin bond under section 544 of the Code of 1942. Moreover, his rights are protected by the bond given by the plaintiff, pursuant to section 530, in order to procure the attachment. If the law were as the respondent here insists, plaintiff's right of appeal might indeed be a hollow right and his victory a fruitless one, if meanwhile the attached property be released and dissipated.

Id. at 335, 40 S.E.2d at 163.

In this case, a stay is appropriate because any victory on appeal by Carolinas will be "hollow" if Piedmont has already pursued building a new hospital and eroded Carolinas' market share and patient base, with no accompanying remedy for Carolinas. Additionally, allowing Piedmont to construct a $100+ Million hospital and then cease operations if Piedmont does not prevail on appeal is inconsistent with the CON Act, which has a purpose to "promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." *See* S.C. Code Ann. § 44-7-120.

To the extent that the Court finds it appropriate to protect Piedmont from any delay caused by a stay should it prevail on appeal, it can exercise its inherent, equitable power to stay the judgment subject to the bond posted by Carolinas under § 44-7-220(B). In such case, the Court may use all or part of the existing bond to secure Piedmont's interest during the pendency of the appeal. If Piedmont ultimately prevails in this appeal, then the Court could choose to award all or part of the bond to Piedmont to compensate it for any injury it suffered upon Piedmont's demonstration of such injury.

For these reasons, the posting of a substantial cash bond by Carolinas justifies a stay of the ALC's Amended Final Order and any further action by the agency in reliance on that Amended Final Order.

IV. CONCLUSION

For the foregoing reasons, Appellant Carolinas respectfully requests that the Court grant its Motion for Relief from Bond and Petition for Supersedeas Pending Resolution of the Appeals Process.

Respectfully submitted,

Douglas M. Muller
Trudy H. Robertson
E. Brandon Gaskins
Moore & Van Allen, PLLC
40 Calhoun Street, Suite 300
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 Telephone
(843) 579-7099 Facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System

March 27, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

MAR 30 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

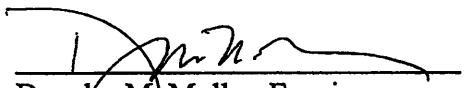
Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the foregoing ***Appellant's Supplemental Brief and Amendment of Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process*** by first class mail with proper postage affixed, addressed as follows:

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley &
Scarborough, L.L.P.
1320 Main Street, 17th Floor
Columbia, SC 29201

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
DHEC, Office of the General Counsel
2600 Bull Street
Columbia, SC 29201



Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Petitioner The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

March 27, 2015

Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ..... Petitioner,

v.

South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is ..... Appellant.

RETURN TO APPELLANT'S SUPPLEMENTAL BRIEF AND AMENDMENT OF MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS

Petitioner Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"), files this Return in Opposition to Appellant's Supplemental Brief and Amendment of Motion for Relief from Bond and Petition for Supersedeas ("Amended Motion"). For the reasons set forth below, Appellant's Amended Motion should be denied.

A decade has passed since Piedmont first applied for a Certificate of Need ("CON") to build a hospital in Fort Mill. For a decade the citizens of the Fort Mill area have waited for a needed hospital. This process has involved two agency reviews, two lengthy trials before the Administrative Law Court ("ALC"), and now an appeal to this Court. *See Amisub of S.C., Inc. v. S.C. Dept. of Health and Environmental Control,* Docket No. 11-ALJ-07-0575-CC, at 2-4 (S.C. Admin. L. Ct. Dec. 15, 2014), ("Amended Final Order"), attached as **Exhibit A**. In its Amended Motion, Appellant The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center - Fort Mill ("CHS" or "Appellant") (1) seeks relief from the bond required by S.C. Code § 44-7-220(B) on the ground that the statute is unconstitutional on its face, and (2) seeks to stay Piedmont from proceeding with its hospital project.

I. OPPOSITION TO RELIEF FROM BOND

A. Section 44-7-220(B) is Constitutional Pursuant to this Court's decision in *Grand Strand.*

Less than one month ago, this Court ruled on a CON appeal and specifically found that Section 44-7-220(B) "is constitutional as written." *See Grand Strand Regional Center v. South Carolina Dept. of Health and Environmental Control*, App. Case No. 2014-000973, at *5 (S.C. Ct. App. March 19, 2015), attached as **Exhibit B**. In so holding, this Court addressed

the exact same constitutional challenges to Section 44-7-220(B) as advanced by Appellant in the instant case – separation of powers, equal protection, and due process. *Id.*, at 3-4.

Appellant goes to great lengths to distinguish the facts and arguments of the instant case from those in *Grand Strand*. However, the alleged distinctions between the two cases are simply irrelevant. This Court had the opportunity to strike down Section 44-7-220(B) in *Grand Strand* but specifically chose otherwise. The outcome of a facial constitutional analysis is not dependent upon the facts and circumstances of a particular case. A statute is either constitutional or it is not, and this Court has already decided that question in regard to Section 44-7-220(B).

B. Section 44-7-220(B) is Constitutional Even in the Absence of the *Grand Strand* Decision.

Even in the absence of the *Grand Strand* decision, the Appellant's constitutional challenges to Section 44-7-220(B) fail.

> A legislative enactment will be sustained against constitutional attack if there is any reasonable hypothesis to support it . . . . [w]hen the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.

Sloan v S.C. Bd. of Phys. Therapy Examiners, 370 S.C. 452, 480-81, 636, S.E.2d 598, 613 (2006) (citations omitted).

Appellant fails to cite to a single case where a statutory appeal bond such as the one in this case was invalidated. Nevertheless, Appellant argues that Section 44-7-220(b) violates the separation of powers doctrine, equal protection, and due process. Each of these arguments is addressed in turn.

1. **Separation of Powers**

> "[A] usurpation of powers exists, for purposes of [the] constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operations of another branch." 16A Am.Jur.2d *Constitutional Law* § 246. This rule is not fixed and immutable, however, as there are grey areas which are "tolerated in complex areas of government." *McInnis,* 278 S.C. at 313, 295 S.E.2d at 636 (1982). There consequently is "some overlap of authority and some encroachment to a limited degree." *Id.*; *see also* 16A Am.Jur.2d *Constitutional Law* § 244. ("Separation of powers does not require that the branches of government be hermetically sealed; the doctrine of separation requires a cooperative accommodation among the three branches of government; a rigid and inflexible classification of powers would render government unworkable."). At its core, the doctrine therefore "is directed only to those powers which belong exclusively to a single branch of government. 16A Am.Jur.2d *Constitutional Law* § 246.

State v. Langford, 400 S.C. 421, 434-35, 735 S.E.2d 471, 478 (2012.)

Appellant argues that Section 44-7-220(B) violates the separation of powers doctrine because it conflicts with portions of Rule 203 and 241, SCACR. In support for this argument, the Appellant relies on a 1982 South Carolina Supreme Court order, which explained that the General Assembly cannot invade the Supreme Court's power to promulgate rules of judicial practice and procedure. *See In re Circuit Court Rule 102*, 1982 LEXIS 483 (S.Ct. Aug. 31, 1982). However, unlike the present case, *In re Circuit Court Rule 102* addressed a direct and existing conflict. The statute at issue required an answer to be served within twenty days of the complaint, while a circuit court rule provided for a thirty day answer period. Applying the principle that the General Assembly cannot intrude upon the court's authority to promulgate rules of procedure, the Supreme Court invalidated the conflicting statute. *See id.* at * 8.

This case presents no such conflict. Rules 203(b)(6),(d)(2), and (e)(2) govern the procedure for CON appeals, but are silent on the issue of bonds. Rule 241 simply provides that the Court may require a bond as a condition for the granting of supersedeas or lifting of the

automatic stay. Section 44-7-220(B) does not conflict with either Rule 203 or 241. *In re Circuit Court Rule 102* is therefore inapplicable.

None of the cases cited by Appellant involves a statutory appeal bond such as Section 44-7-220(B). *Rutherford v. Rutherford,* 307 S.C. 199, 414 S.E.2d 157 (1992) did not even involve a separation of powers issue, but, rather, a statute limiting the scope of review in domestic cases that was "clearly in conflict" with the language of Article V, Section 5 of the South Carolina Constitution. *Id.*, 307 S.C. at 203, 414 S.E.2d at 159-60. In *Elk Horn Coal Corp v. Cheyenne Res. Inc.,* 163 S.W.3d 408 (Ky. 205), the court addressed the constitutionality of a statutory penalty for second appeals in damages cases, not a statutory appeal bond. *Id*, 163 S.W.3d at 410. Finally, the court in *Consumers Gas Co. v. Illinois Commerce Comm'n,* 493 N.E.2d 1148, 1152 (Ill. Ct. App. 1986) held that certain statutory procedures for an obtaining an appeal bond were unconstitutional, but only to the extent they conflicted with state supreme court rules. *Id.* As explained, Section 44-7-220(B) does not conflict with any court rules, and, therefore, *Consumers Gas Co.* is inapplicable.

2. Equal Protection

To satisfy the equal protection clause, a classification not involving a fundamental right or a suspect class must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis. *Sloan,* 370 S.C. at 480, 636 S.E.2d at 613. A court "must give great deference to a legislative body's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue." *Sloan,* 370 S.C. at 480-81, 636 S.E.2d at 613. Furthermore, "[t]he classification does not need to completely accomplish the legislative purpose with delicate precision in order to

survive a constitutional challenge." *Id.* (quoting *Foster v. S.C. Dept. of Highways Pub. Transp.*, 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992)).

Appellant argues that Section 44-7-220(B) treats CON appellants differently from other appellants by requiring CON appellants to post an appeal bond, with no rational basis for the distinction. In *Grand Strand*, however, this Court found that "there is a rational basis for [Section 44-7-220(B)'s] provision awarding a respondent the appeal bond if the ALC's decision is upheld, and this provision is related to a legitimate government interest." *Grand Strand* at 4. The legitimate government interest behind Section 44-7-220(B) is the need "to reserve some funds to compensate a respondent harmed by the delay of its approved project during the pendency of the appeal." *Id.*

Appellant relies heavily on *Lindsey v. Normet,* 405 U.S. 56 (1972) and *O'Day v. George Arakelian Farms, Inc.* 536 F.2d 856 (9th Cir. 1976), neither of which addressed an appeal bond like Section 44-7-220(B). Instead, both *Lindsey* and *O'Day* invalidated statutes with a "double bond" requirement, holding that no rational basis supported requiring a double bond to effectuate an appeal.[1] *Lindsey,* 405 U.S. at 76-77; *O'Day*, 536 F.2d at 860. Appellant also relies on *Elk Horn*, which involved a statutory penalty for a second appeal, intended to deter frivolous appeals. 163 S.W.3d at 415. The *Elk Horn* court held the statute at issue violated equal protection because it had the effect of deterring both frivolous and meritorious appeals and thus lacked a rational basis. *Id.*, at 421-22.

Section 44-7-220(B) does not require a double bond nor impose a penalty, like the cases relied upon by Appellant. Moreover, unlike the statutes at issue in *Lindsey, O'Day,* and *Elk*

[1] It is important to note that the Court in *Lindsey* specifically recognized the validity of a statutory appeal bond requirement, stating that a "State may properly take steps to insure that an appellant post adequate security before an appeal. . . ." *Id.* at 77-78.

Horn, Section 44-7-220(B)'s bond provision bears a reasonable relation to a legitimate government purpose and its classifications rest on a rational basis. *See Grand Strand* at 4.

3. Due Process

Finally, Appellant argues that the bond requirement in Section 44-7-220(B) violates due process because it burdens access to judicial review. "The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review." *Grand Strand* at 4 (quoting *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E. 2d 776, 781 (Ct. App. 2009)). What this Court noted about the Appellant in *Grand Strand* applies equally to the Appellant in the present appeal: "Appellant has successfully initiated its appeal of the ALC's decision, and this Court will soon give Appellant its judicial review." *Grand Strand* at 4. "We find there has been no impairment of Appellant's right to judicial review under Article 1, Section 22 of the South Carolina Constitution, nor has there been a violation of its right to procedural due process." *Id.* at 3-4.[2]

To the extent Appellant contends that Section 44-7-220(B) violates substantive due process, that issue was also decided in *Grand Strand*: "[W]e find Appellant has not demonstrated an equal protection or substantive due process violation because there is a rational basis for [Section 44-7-220(B)'s] provisions awarding a respondent the appeal bond if the ALC's decision is upheld, and this provision is related to a legitimate government interest." *Grand Strand* at 4.

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[2] In support of its due process argument, Appellant cites *Boddie v. Connecticut*, 401 U.S. 371 (1971). In *Boddie*, indigent appellants argued that a state statute requiring certain court fees and costs was unconstitutional as applied to them, in that it restricted their access to the courts to bring a divorce action. 401 U.S. at 372. *Boddie* is clearly distinguishable from the present case.

II. OPPOSITION TO SUPERSEDEAS

In its original motion, Appellant argued that a stay was appropriate pursuant to Section 44-7-220(B) and Rule 241(c), ALR. To the extent Appellant still asserts arguments based on Section 44-7-220(B) and Rule 241(e), Piedmont will address them briefly.

In *Grand Strand* this Court emphasized that Section 44-7-220(B) contains no stay requirement "and we decline to insert such a requirement in the statute." *Grand Strand* at 3. Rule 241(c)(2) provides that "[in] determining whether [a supersedeas] should issue. . . [the court] should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." In *Grand Strand* the Court found:

> We find there is no danger the court will lose jurisdiction or the issues on appeal will become moot if Grand Strand is allowed to proceed with its project. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis,* 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Grand Strand acknowledges that if it were to proceed with construction of its facility, it would have to cease all operations related to its project if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

Grand Strand at 2. Similarly, Piedmont acknowledges that it would be required to cease operations on its Fort Mill hospital project should the ALC's decision be reversed.

In its Amended Motion, CHS argues this Court should preliminarily enjoin Piedmont from starting work on its Fort Mill hospital during the appeal, pursuant to S.C. Code §1-23-380 and SCRCP 65. Section 1-23-380(1) of the South Carolina Administrative Procedures Act provides that "[p]roceedings for review are instituted by filing a petition . . . ." Section 1-23-380(2) then adds: "The filing of the petition does not itself stay enforcement of the agency

decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure."

Piedmont is unaware of any case in which Rule 65 has been applied to a petition for supersedeas, filed pursuant to SCACR 241(c), during the pendency of an appeal, following a final evidentiary hearing. Moreover, CHS has not filed a petition under Rule 65. *See Grand Strand* at 3, 5 (noting that Appellant CRCC had not filed a Rule 65 petition). Even if Rule 65 were to apply to a petition for supersedeas, one should not be granted to CHS. Issuance of a preliminary injunction requires the movant to satisfy three criteria: irreparable harm, a likelihood of success on the merits, and no adequate remedy at law. *Poyntner Investments, Inc. v. Century Builders of Piedmont, Inc.* 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

1. Irreparable Harm

Appellant CHS contends that failure to impose a stay would cause it to lose market share and revenue. The ALC's decision to award the CON to Piedmont was based on its finding that, for years, Piedmont has lost market share to CHS due to CHS's CPN physician network referring patients exclusively to CHS hospitals located outside of York County. *Order Denying Respondent's Motion to Stay/Supersedeas Pending Appeal* at 5 (attached as **Exhibit C**). Permitting CHS to build a hospital in York County "would accelerate [Piedmont's] loss of market share, erode its payor mix, and would put at risk the quality of medical care available to York County patients . . . ." *Id.* The ALC further noted that CHS's present position is inconsistent with the position it asserted at trial:

> Additionally, the court finds it curious that the Respondent is now asserting that it will lose market share to the Petitioner if it is permitted to build its hospital in Northern York County. During the trial in this matter, it was the Respondent's position that its proposed Northern York County hospital's function would primarily be to relieve the high patient volume at its other hospitals and accommodate existing patients that were currently receiving care at those other CHS facilities outside of the county. The Respondent's position was that building its proposed hospital in Northern York County would allow it to manage its existing York County patient base better. Therefore, this court fails to understand how permitting the Petitioner to build its hospital will have any effect on the Respondent's existing market share which is currently being cared for at the Respondent's other hospitals.

Ex. C at 5.

The ALC's Amended Final Order found that the establishment of Piedmont's Fort Mill hospital "could" restore Piedmont's market share in the Fort Mill area to what it had been in 2003-2004, before CHS began taking significant market share from Piedmont. Ex. A, Findings of Fact 20-26, 79. It is unreasonable to believe, however, that the restoration of Piedmont's market share will occur overnight. Even after the new hospital is constructed, it could take years for Piedmont to recapture the market share it lost to CHS from 2005-2012. *See id.*

Even if CHS could demonstrate that Fort Mill Medical Center were likely to cause it some immediate economic loss, such a loss would be insufficient to constitute irreparable harm. "Generally, pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate an adequate remedy is available at law." *Professional Wiring Installers, Inc. v. Sims*, 2008 WL 9840409 (S.C. App. 2008) (UNPUBLISHED), *citing MailSource, LLC v. M.A. Bailey & Assocs.* 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The exception to the general rule is that pure economic loss may constitute

irreparable harm when it causes the "complete loss" of a business. *Peek v. Spartanburg Reg. Healthcare Syst.*, 367 S.C. 450-455, 626 S.E.2d 34, 37 (Ct. App. 2005) ("The complete loss of a professional practice can be an irreparable harm"); *Levine v. Spartanburg Reg. Servs. Dist.*, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) ("loss of . . . professional practice and career . . . can be an irreparable harm."); *Dist. of Columbia v. E. Trans-Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt.1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement . . . .").

CHS is a public hospital system based in Charlotte that owns or manages 42 hospitals, in addition to various other healthcare facilities and a large physician network. Ex. A, Findings of Fact 4, 23. According to its own witness, in 2011 CHS had net assets of $3.5 billion. Trial Trans. at 1849:18-1850:4, attached as **Exhibit D**. It is undisputed that CHS was doing well financially prior to 2005, when it began taking significant market share from Piedmont. It is undisputed that CHS is doing well financially today. There is absolutely no risk that a 100-bed hospital in Fort Mill could threaten CHS's existence or, therefore, cause it irreparable harm.

Any change in referral patterns generated by operation of Fort Mill Medical Center would revert back if CHS were successful on appeal. Moreover, Piedmont has not yet begun its project, which is scheduled to take 26 months to complete. Piedmont Updated CON Application, Project Timeline (Revised 2010), attached as **Exhibit E.**[3] Therefore, even if

[3] The timeline optimistically assumed a start date of April 2013 and a completion date of July 2015.

Piedmont were to begin its project today, "this court will likely decide the merits of the appeal before completion of [Piedmont's] project and thus, well before area doctors begin to change their referral patterns." *See Grand Strand* at 3 (noting that the Grand Strand project was expected to take 18 months.) If the Court imposes a stay and Piedmont prevails, months will be added to the time necessary for the appeals process, depriving citizens in the service area even longer of a new hospital.

2. Likelihood of Success on the Merits

CHS cites *Williams v Jones*, 92 S.C. 342, 348, 75 S.E. 705, 710 (1912) for the proposition that CHS need only raise a "fair question" as to its likelihood of success. It further cites *Transcontinental Gas Pipe Line Corp v. Porter*, 252 S.C. 478, 481, 167 S.E. 2d 313, 315 (1969) for the principle that simply a prima facie showing in the complaint of entitlement to injunctive relief is all that is required to show a likelihood of success.

Both *Williams* and *Transcontinental* involved preliminary injunctions issued by a trial court before a trial was held. At such an early stage of litigation, before any evidence has been submitted or even before any discovery has been conducted, it would be inappropriate for the court to consider the merits of the case. At that stage of litigation, the only way to demonstrate a likelihood of success is by establishing a prima facie case in the complaint.

[INTENTIONALLY LEFT BLANK]

That, however, is not the situation in the present case. A fifteen-day trial has been held, following years of litigation. The ALC has issued a Final Order and an Amended Final Order. Appellant asks this Court to don blinders and ignore the findings and conclusions of the ALC's 53-page Amended Final Order, which meticulously analyzes the merits of CHS's case and finds it lacking. CHS offers no authority to support its argument that in a petition for supersedeas in a post-trial appeal, the likelihood of success on the merits should be analyzed by whether the Appellant established a prima facie case in its initial pleading.[4] *See Ex. C* at 6.

3. Adequate Remedy at Law

CHS clearly has an adequate remedy at law – the appeal it has just filed. If CHS wins the appeal, Piedmont will have to cease development of its hospital project. The purpose of a temporary injunction is to preserve the status quo. *Peek*, 367 S.C. at 456, 626 S.E.2d at 37. If Piedmont ceases construction or operation of Fort Mill Medical Center, the status quo will be preserved.

[4] The principal issue on which Appellant bases its hopes of success relates to an alleged violation of the dormant commerce clause. The Amended Final Order addresses CHS's dormant commerce clause argument in a lengthy footnote. Ex. A at 2, n.2. The Court observes that the same State Health Plan, project review criteria, and analysis would have been used in the Amended Final Order "regardless of whether competing applicants were out-of-state or in-state providers." *Id.* In fact, "the same plan, criterion and analysis have been applied in similar cases in which CHS has been awarded a CON in South Carolina. The decision of the court has been the result of an extended process commencing prior to 2006 when DHEC issued its first Decision. The court was permitted to make its own findings of fact by a preponderance based on the evidence presented. Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because CHS disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause." *Id.*

III. CONCLUSION

Less than one month ago this Court expressly held that Section 44-7-220(B) "is constitutional as written." *Grand Strand* at 5. To the extent SCRCP 65 applies to this appeal, Appellant cannot show irreparable harm, likelihood of success, or an inadequate remedy at law. For these reasons, the Amended Motion should be denied.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Stuart M. Andrews, Jr.
stuart.andrews@nelsonmullins.com
Daniel J. Westbrook
dan.westbrook@nelsonmullins.com
1320 Main Street, 17th Floor
Post Office Box 11070
Columbia, South Carolina 29201
(803) 799-2000

Attorneys for Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center

Columbia, South Carolina

April 13, 2015

CERTIFICATE OF SERVICE

I, the undersigned administrative assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by placing same in the United States mail, postage prepaid, to the following address(es):

Pleadings: **RETURN TO APPELLANT'S SUPPLEMENTAL MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS**

Counsel Served:

Douglas M. Muller, Esq.
Trudy H. Robertson, Esq.
E. Brendon Gaskins, Esq.
Moore & Van Allen PLLC
78 Wentworth Street (29401-1428)
Post Office Box 22828
Charleston, SC 29413-2828

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Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
Bureau of Health Facilities & Services Development
South Carolina Department of Health & Environment Control
2600 Bull Street
Columbia, SC 29201

Myriam Brown
Administrative Assistant

April 13, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center, Petitioner, v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill, Respondents.	Docket No. 11-ALJ-07-0575-CC **AMENDED FINAL ORDER**

APPEARANCES: Stuart M. Andrews, Jr., Esquire and Daniel J. Westbrook, Esquire for Petitioner Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center

Douglas M. Muller, Esquire, Trudy H. Robertson, Esquire, and E. Brandon Gaskins, Esquire for Respondent The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill,

Ashley C. Biggers, Esquire for Respondent South Carolina Department of Health and Environmental Control

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or court) pursuant to the request for a contested case hearing filed by Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center (Piedmont). Piedmont is challenging the decision of the South Carolina Department of Health and Environmental Control (DHEC or the Department) to grant a certificate of need (CON) to The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill Carolinas Healthcare System (CHS) to build a general acute care hospital in York County, South Carolina. The hearing was held over the course of fifteen (15) days between April 8, 2013, and May 7, 2013. The court issued its Final Order and Decision in the matter on March 31, 2013. Upon a Motion for Reconsideration filed by CHS, the court issued an Order vacating the March 31, 2013 Final Order and Decision. For the reasons set forth

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in this Amended Final Order, the court concludes that the CON application should be granted to Piedmont for the purpose of building a one hundred (100) bed general acute care hospital in York County, South Carolina.[1,2]

BACKGROUND

York County, South Carolina is among the fastest growing counties in the state. Jt. Ex. 1-B at 1004. One of the fastest growing and most affluent parts of York County is the area surrounding the town of Fort Mill in Northern York County. Tr. 215:12-16; 1235:14-19. The western part of the county (Western York County) is more rural, less populous, and less affluent. Tr. 1236:14 - 1238:12.

The 2004-2005 South Carolina Health Plan (State Health Plan or Plan) identified a need for 64 additional acute care hospital beds in York County. Based on the need identified in the Plan, DHEC received four applications for a Certificate of Need (CON) to build a hospital near the town of Fort Mill. The four applicants were Piedmont, CHS, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. (HPA). In January 2005, Piedmont applied to construct and operate a sixty-four (64) bed hospital. On March 11, 2005, CHS, Presbyterian, and HPA each filed competing applications to construct and operate a 64 bed hospital. On October 6, 2005, Piedmont withdrew its January 2005 application and submitted a

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[1] In their Petition for Rehearing as to the original Final Order and Decision issued on March 31, 2014 and subsequently vacated on May 2, 2014, CHS argued that the three (3) physicians that testified were not "independent" as they were affiliated with Piedmont. The use of the word, "independent," was utilized in the sense that those physicians were not contractually bound by any employment agreement to refer patients to any particular facility. To avoid further misinterpretation, the word, "independent" has been removed. CHS also argues that the court erred in allowing these physicians to testify at the contested case hearing on the basis that they testified beyond the scope of their deposition testimony. The admission of testimony and the weight and credibility assigned to the same is within the purview of the court. The court does not believe that there was any abuse of discretion in allowing the admission such testimony. Hill v. S.C. Carolina Dept. of Health & Envtl. Control, 389 S.C. 1, 698 S.E.2d 612 (2010). CHS also had a full and fair opportunity to cross-examine these witnesses at the contested case hearing and did not request additional time to prepare for further examination during the course of the hearing.

[2] In their Petition for Rehearing as to the original Order, CHS argues that the court's opinion violates the Dormant Commerce Clause. Upon review of the applicable case law, the parties' briefs and both the original and Amended Orders, the court does not believe it violated the Dormant Commerce Clause in its analysis and application of the State Health Plan or Project Review Criterion in the original or amended decisions. The same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers. In fact, the same plan, criterion and analysis have been applied in similar cases in which CHS has been awarded a CON in South Carolina. The decision of the court has been the result of an extended process commencing prior to 2006 when DHEC issued its first Decision. The court was permitted to make its own findings of fact by a preponderance based on the evidence presented. Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because CHS disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

new application for a 100 bed hospital. The 100 bed hospital would include 64 general acute care hospital beds for which the Plan showed a need as well as thirty-six (36) licensed general acute care hospital beds that were to be transferred from the Piedmont Medical Center in Rock Hill to a new facility in Fort Mill. Piedmont's proposed hospital would be called Fort Mill Medical Center (FMMC). CHS' proposed hospital would be called Carolinas Medical Center – Fort Mill (CMC-FM).

By decision letters dated May 30, 2006, DHEC approved Piedmont's application to construct a 100 bed general acute hospital in York County and denied the applications of Presbyterian, CHS, and HPA for 64 bed hospitals. In response to DHEC's decision, CHS and Presbyterian filed separate requests for contested case hearings at the ALC.[3] The cases were assigned to the Honorable Carolyn C. Matthews and consolidated into *The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System and Presbyterian Healthcare System d/b/a Presbyterian Hospital-York, LLC v. South Carolina Department of Health and Environmental Control and Amisub of South Carolina, Inc. d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center,* Docket No. 06-ALJ-07-0713-CC.

The contested case hearing was held in September 2009. At the conclusion of the presentation of evidence by Petitioners CHS and Presbyterian, both parties moved for summary judgment, arguing that DHEC erred in interpreting the Plan in such a manner as to allow only Piedmont, as the existing facility in York County for which the Plan designated additional beds, to be approved and to require the denial of all other applicants. Piedmont moved for partial summary judgment on the issue of whether it was a "competing applicant." On December 9, 2009, Judge Matthews issued an Order that upheld DHEC's finding that Piedmont was a competing applicant for the CON at issue in this matter. However, Judge Matthews found that DHEC erroneously interpreted the Plan to allow only existing providers—in this case, Piedmont Medical Center—to obtain a CON. Based on this finding, Judge Matthews remanded the matter to DHEC with instructions:

> 1. Review the Presbyterian, Carolinas [CHS], and FMMC [Piedmont] CON applications to determine "which of the applicants, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by the department" as required by S.C. Code Ann. § 44-7-210(C).
>
> ....

[3] HPA did not appeal DHEC's 2006 decision and is not a party to the matter currently pending before this court.

7. The Department's decisions must be made based upon the fact that each of the parties is in equal compliance with 24A S.C. Code Reg. 61-15 § 802.1. The Department's decisions must be accompanied by written findings as to each applicant's compliance with the relevant Project Review Criteria and which party best meets each project review criterion and the basis thereof.

Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, Docket No. 06-ALJ-07-0713-CC (Dec. 9, 2009), pp. 27-28 (emphasis in original). On appeal, the South Carolina Supreme Court concluded that the Order of December 9, 2009, was interlocutory because a final determination as to the CON had not been made. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).[4] The parties, therefore, proceeded with the remand instructions.

The parties consented to a deadline of October 4, 2010, for filing updated information with DHEC. All three parties submitted supplemental information to update their previous CON applications. During the ensuing eleven months, each applicant submitted additional information concerning its CON application to DHEC, either on its own initiative or in response to numerous requests by DHEC staff for additional information. The volume of material submitted by the applicants to DHEC during this period was extensive. DHEC held a Project Review Meeting on June 29, 2011, which provided the opportunity for each applicant to make a presentation and answer questions posed by DHEC staff.

On September 9, 2011, DHEC issued three (3) decision letters, this time granting CHS' application and denying the applications of Presbyterian and Piedmont. Each decision letter included three or four numbered paragraphs highlighting the basis for the decision contained therein, and they also referenced the Project Review Criteria Analysis that was attached to all three decisions. The ten-page Project Review Criteria Analysis, along with the Project Review Summary for each applicant, serves as the Summary of Staff Findings.

After the DHEC Board denied the request for a final review conference, the decision letters of September 9, 2011 became the final decisions of DHEC. Presbyterian and Piedmont timely requested contested case review of these decision letters. This court consolidated the cases on January 31, 2012. Pursuant to its motion to withdraw, this court dismissed Presbyterian as a party by Order dated February 1, 2013.

[4] For purposes of this Amended Order, the court will defer to Judge Matthews' finding that Piedmont's application qualified as a competing application and that all of the applicants were in equal compliance with S.C. Code Ann. Regs. 61-15 § 802.1.

STANDARD OF REVIEW

This Court reviews contested case actions *de novo*. *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004). Petitioner bears the burden of proof by a preponderance of the evidence. *Nat'l Health Corp. v. S.C. Dep't. of Health & Envtl. Control*, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989).

FINDINGS OF FACT

Having carefully considered all testimony, exhibits, and arguments presented at the hearing of this matter, and taking into account the credibility of the witnesses and the reliability of the evidence, I make the following findings of fact by a preponderance of the evidence:

1. Piedmont is an existing two-hundred-eighty-eight (288) bed acute care hospital located in Rock Hill, York County, South Carolina.[5] Piedmont is operated by Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare Corporation (Tenet). Tenet is a for-profit, publicly traded company that is headquartered in Dallas, Texas and owns forty-nine (49) hospitals in ten (10) states. Tr. 177:20-23; 193:5-16. Piedmont has a medical staff of approximately three hundred fifty (350) physicians and employs more than one thousand five hundred (1,500) persons, including six hundred seventeen (617) nurses, one hundred forty-one (141) of which live in Northern York County or Mecklenburg County, North County. Tr. 186: 3-12, 187: 9-16. In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually offered by a hospital its size, including open heart surgery, neurosurgery, cardiac catheterization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health. Tr. 184:3, 185:10.

2. Piedmont Medical Center has won a number of quality awards in recent years. In 2013 and 2010 it was named Distinguished Hospital of the Year in South Carolina for cardiovascular disease and stroke services by DHEC and the American Heart Association (AHA). Tr. 189:1-10. In 2013 the AHA also awarded Piedmont Medical Center the Gold Plus Achievement Award for treatment of heart failure and stroke. Tr. 189:21 - 190:1. In 2011 Piedmont was one of four hospitals in the state cited by the Joint Commission of Accreditation of Healthcare Organizations (Joint Commission) as a Top Performer on Key Quality Measures of

[5] Piedmont Medical Center has 288 beds, which includes 268 acute care beds and 20 beds for psychiatric services. This case focuses on the addition of 64 acute care beds. As a result, most of the discussion pertains to the 268 acute care beds, rather than the psychiatric beds.

heart attack, heart failure, pneumonia, and surgical care. Tr. 190:3-21. Piedmont also has a number of certifications and accreditations, as well as payor recognitions for quality of care. Tr. 191:19 - 193:4.

3. Amisub pays local, state, and federal taxes. Tr. 952:20 – 953:2. Operating as a division of Amisub, Piedmont's proposed FMMC is projected to pay over $4,000,000 per year in local property taxes, including taxes levied by York County school districts. Tr. 493:9 – 15.

4. CHS is a public hospital system created by North Carolina statute and headquartered in Charlotte, North Carolina. Tr. 1682:1-10. CHS owns or manages forty-two (42) hospitals, in addition to various healthcare facilities. Tr. 1778:16-20. CHS' largest hospital is Carolinas Medical Center (CMC-Main), located in Charlotte, North Carolina. CMC-Main has more than eight hundred (800) beds and provides highly specialized tertiary and quaternary services. Tr. 200:14-20. The closest CHS hospital to Piedmont Medical Center is CMC-Pineville, located just across the state line in Pineville, North Carolina, an approximately twenty-five (25) minute drive from Rock Hill. Tr. 198:20-21. From 2002 to 2013, CHS spent more than $300,000,000 expanding CMC-Pineville from ninety-seven (97) to two hundred six (206) beds. Tr. 1188:2-23. During this period CHS also expanded CMC-Pineville's services to include specialized tertiary services similar to those provided at Piedmont Medical Center. Tr. 1191:23 – 1192:9.

5. CHS has also been recognized for the quality of its clinical services. For example, CHS' 42 hospitals have been awarded a combined twenty-one (21) Joint Commission certifications. Like Piedmont, CHS has been party to a contract with its home county, under which Mecklenburg County reimbursed it over $16,000,000 annually to provide certain charity care services. Tr. 492:4-12. In 2012, however, the contract was terminated. *Id.* From January 2007 - July 21, 2012, CHS filed over nine thousand seven hundred (9,700) collection actions against patients for not paying their bills. Piedmont Ex. 114 at 17. As a result, CHS obtained nearly five thousand (5,000) liens on patient homes. *Id.*; Tr. 1748:13-17.

6. DHEC is a state agency charged with, among other things, implementing South Carolina's CON regulatory program, which includes licensing standards for the establishment of acute care hospitals. S.C. Code Ann. § 44-7-140. By statute, DHEC is "the sole agency for control and administration of the granting of [CONs] and licensure of health facilities." *Id.* As part of its duties, DHEC is required to publish, at least every other year, a South Carolina Health

Plan, outlining the need for medical facilities and services in the State. The South Carolina Health Plan includes an inventory of existing facilities and services, projections of need for additional facilities and services, standards for distribution of facilities and services, and general statements regarding project review criteria for consideration of CON applications. S.C. Code Ann. § 44-7-180(B).

7. The original CON applications in this case were based on the need identified in the 2004-2005 South Carolina Health Plan. In that Plan, DHEC projected the population in York County would grow from 172,090 in 2003 to 192,300 in 2010. The Plan also recognized that the occupancy rate at Piedmont Medical Center, the only general acute care hospital in York County, had increased from sixty-five and two-tenths (65.2) percent in 2001 to seventy-five and one-tenth (75.1) percent in 2003. Based on historical occupancy rates at Piedmont Medical Center, and the projected growth of the York County population, DHEC identified a need for three hundred thirty-two (332) acute care beds in York County. The Plan, therefore, identified a need for an additional 64 acute care hospital beds over and above Piedmont Medical Center's existing two hundred sixty-eight (268) acute care beds.

8. The other relevant plan is the 2012-2013 South Carolina Health Plan, which became effective November 9, 2012, and is currently in effect. In that plan, DHEC revealed that the occupancy rate at Piedmont Medical Center, the only existing acute care hospital in York County, decreased from 75.1 percent in 2003 to fifty-seven and one-tenth (57.1) percent in 2009. Although the occupancy rate subsequently increased to fifty-eight (58) percent in 2010 and sixty-two and one-tenth (62.1) percent in 2011, it still has not returned to its 2001 occupancy rate. DHEC also projected that the population of York County would increase from 229,600 in 2011 to 253,900 in 2018.

9. CHS proposes to construct a 64 bed hospital to be located in Fort Mill, South Carolina, at a total project cost of $79,101,360. Joint-A-CHS-001.0143. CHS intends to serve patients that are already aligned with its system. The proposed CHS Fort Mill hospital is a smaller acute care hospital that will serve a different acuity level of patients than Piedmont's larger, tertiary hospital. Redirecting a sizeable portion of the CHS-aligned patients in Northern York County to a new CHS hospital in Fort Mill will cause the new hospital to be well-utilized.

10. Piedmont proposes to construct a 100 bed hospital to be located in Fort Mill, South Carolina, at a total project cost of $119,808,964, without financing, or $146,522,042,

which includes financing costs during construction. Joint-B-PMC-001.0010. Piedmont's proposal envisions transferring 36 beds from Piedmont Medical Center, its existing hospital in Rock Hill, to its new hospital in Fort Mill, and adding those to 64 beds for which a need is recognized in the 2004-2005 South Carolina Health Plan for York County. Currently, Piedmont Medical Center in Rock Hill has a daily census of one hundred eighty (180) beds, meaning that on any given day the facility has one hundred (100) or more empty beds. Of the 36 beds it proposes to transfer from Piedmont Medical Center to its Fort Mill facility, nineteen (19) were not being staffed or used for patient care. By transferring the beds, Piedmont intends to redeploy resources from Rock Hill to the Fort Mill area where there is a greater need for them.

11. At the time of the review of the CON applications on remand, Beverly Brandt was the DHEC Chief of Bureau of Health Facilities and Services Development. Ms. Brandt, who was not involved in the original review in 2006, relied on the ranking of the Project Review Criteria that was established by DHEC during its original 2006 review. (Tr. 873:6 – 20; 1376:20 – 1377: 10). In a letter from Mary Fechtel dated March 27, 2006, DHEC established the relative importance of the project review criteria, listing the most important criteria first, as follows:

Rank 1	Compliance with the State Plan (1)
Rank 2	Community Need Documentation (2a-2e)
	Distribution (Accessibility) (3a-3g)
	Distribution (22)
Rank 3	Projected Revenues (6a, 6b)
	Projected Expenses (7)
	Net Income (9)
	Financial Feasibility (15)
	Cost Containment (16a-16c)
	Efficiency (17)
Rank 4	Record of the Applicant (13a, 13b, 13d)
	Acceptability (4a-4c)
	Adverse Effects on Other Facilities (23a, 23b)

Resp. Ex. 2C, 000697; Resp. Ex. 4B, 000592. These criteria are grouped in the DHEC regulation in the general categories of Need for the Proposed Project, Economic Consideration, and Health System Resources. § 801(1). Thus, DHEC's ranking established that these categories would be the focus of its review of the CON applications for building a hospital in Fort Mill. DHEC also established that all other relevant criteria would be given equal importance. The remaining criteria are grouped in the DHEC regulation in the general categories of Site Suitability and Special Consideration. § 801(1).

The York County Contract

12. Since 1980 Piedmont has been party to a contract with York County (the York County Contract) that does not expire until 2045. Tr. 193:24 – 194:13. The contract has been amended numerous times over the years, and the parties are currently negotiating the tenth addendum to the contract. Tr. 957: 19 – 24. In the Ninth Addendum, the parties expressed their intent that the terms and conditions of the contract, including the various amendments, would apply to FMMC. Tr. 957:13 – 18. The York County Contract restricts how much Piedmont can charge for services, requires quarterly and annual public financial reports to the county, and further requires Piedmont to make certain annual capital investments in facilities or equipment. The contract also requires Piedmont to provide various non-hospital based services, including county-wide ambulance services at no charge to the County and an urgent care center in Western York County. Tr. 945: 5 – 10; 195:9 – 196:5.

13. Piedmont provides some of these services at a loss. For example, it operates the county-wide ambulance service at a loss of approximately $4,000,000 - $4,500,000 per year, and the service transports a significant number of patients to hospitals other than Piedmont located outside of York County. Tr. 944: 4 – 7. In addition, Piedmont agreed under the Ninth Addendum to the contract to provide full-time (24/7) physician coverage at its urgent care center in Western York County. Tr. 954:16 – 955:13. Because of the limited demand for urgent care services in Western York County, Piedmont lost $800,000 a year for each of the five (5) years it staffed the center at the level requested by York County. Tr. 956:5 – 11. Under the Sixth Addendum, Piedmont undertook to pay an indigent care tax to the state of approximately $450,000 per year that would otherwise be assumed by York County. Tr. 950: 11 – 15.

14. David S. Levitt, the healthcare planning consultant who drafted Piedmont's application and has provided CON services in over four hundred fifty (450) matters throughout South Carolina and the northeast and southeast, testified that he is aware of no other hospital that has assumed comparable contractual responsibilities to the counties in which they are located. Tr. 491:23 – 492:3. Piedmont's commitment to the York County community, as expressed through this long-standing contract, is impressive. The citizens of York County derive innumerable benefits as a result of the transparency and enforceable obligations of the contract. While Piedmont could have withdrawn from the contract at points during the past three decades, Piedmont has continued to maintain its commitment to reasonable pricing, capital reinvestment,

ambulance services that operate at a substantial loss to Piedmont, and comprehensive annual reports on the operation of the hospital and its performance under the contract.

15. Piedmont's interest in establishing a hospital to serve the Northern York County and Fort Mill area began several years before it filed its initial CON application in November 2004. Tr. 960:1-6; 449:1-4. In 1999, Piedmont recognized Northern York County as one of the fastest growing areas of the state and developed plans to establish a medical presence in the area. Tr. 961:5-12. Charles F. Miller, Piedmont's chief executive officer from 1998-2013, testified that Piedmont hoped to meet the growing demand for healthcare services and to reduce the outmigration of York County residents to out of county hospitals by establishing a hospital in the Fort Mill area. Tr. 961:15 – 962:1.

16. During this period of time, Piedmont was notified by a local developer, Clear Springs Development Company (Clear Springs), of its interest in the establishment of a series of planned communities in the Fort Mill area that would incorporate a broad range of healthcare services and facilities. Tr. 960:10-24; 963:2-16. Clear Springs became the development vehicle used by the Close family to convert its Fort Mill area holdings into various planned communities. Tr. 962:19-23. In April 1999, Clear Springs issued a request for proposals RFP) to Piedmont, CHS, and Presbyterian seeking proposals for the development of healthcare services in Baxter Village. Piedmont and Presbyterian submitted proposals; CHS did not. Tr.436:12 – 437:17. In October 1999, Piedmont was selected by Clear Springs to develop the healthcare services that would be located on the Baxter Medical Campus in Fort Mill. *Id.* These services included physician practices, urgent care services, an imaging center, and ultimately a hospital.[6] Tr. 436:5-8.

17. By letter dated October 5, 2000, Mr. Miller requested, and subsequently received, Tenet's approval to enter into an agreement with Clear Springs to develop the proposed Baxter Village healthcare services. Tr. 965:3 – *see* Piedmont Ex. 25. In that letter, Mr. Miller stated: "A major portion of Piedmont Healthcare System's strategic plan for the last decade has been centered on initiatives to reduce outmigration from York County to Charlotte-based facilities." Tr. 965:24 – 966:3.

[6] The parties acknowledged that the establishment of the hospital and other healthcare facilities would be subject to CON review. Tr. 969:1-9. Clear Springs and Piedmont also agreed to change the location of the proposed hospital site from Baxter Village to a site adjacent to Clear Springs' Kingsley North project that included plans for 1200 residences, one million square feet of commercial office space, and a three hundred (300) room hotel. Tr. 970:9 – 971:18.

18. The Fort Mill satellite hospital has been the centerpiece of Piedmont's long-term plan to serve York County. The hospital would create a presence in Northern York County and would provide local services to a growing population that has historically travelled outside of York County, mostly to the Charlotte area, for a wide range of needs, including employment, shopping, entertainment, and healthcare. Tr. 966:13 – 967:2. By reducing outmigration of patients from the Northern York County and Fort Mill area, the satellite hospital would also strengthen Piedmont's services to residents throughout York County by increasing the number of patients treated at Piedmont's Rock Hill facility. Tr. 439:15-18.

19. The agreement between Piedmont and Clear Springs to develop the Baxter Village Medical Campus provided for a ten (10) year period to establish a hospital. Tr. 968:17-19. When the 2004-2005 State Health Plan was published showing a need for 64 beds, and after taking into consideration the time necessary to process the CON application and to design, develop, and construct the hospital, Mr. Miller believed that the FMMC would open on schedule in 2010. Tr. 968:2-5; 17-25.

Utilization

20. From 1997 to 2005, the utilization of Piedmont by York County residents increased forty (40) percent, from approximately ten thousand (10,000) to fourteen thousand (14,000) inpatient discharges. Tr. 433: 10 – 15. During that period, Piedmont's market share of York County patients who received inpatient hospital services was generally flat, registering a high of sixty-seven (67) percent in 2002 to a low of sixty-four (64) percent in 2005. Tr. 434: 4 - 12. The utilization increase Piedmont experienced in the period occurred proportionately during this period with other hospitals serving York County residents. Tr. 434:13 – 17.

21. Several significant developments occurred between the time of the filing of the Fort Mill area CON applications in 2005 and the filing of the updated applications in 2010 following the remand of this case. Tr. 450:13 – 17. The first was the decrease in utilization of Piedmont by York County residents. During this period, Piedmont's utilization dropped from approximately fourteen thousand (14,000) to eleven thousand (11,000) discharges. Tr. 451:15 – 21; Piedmont Ex. 136. This decline in patient volume nearly erased the growth in utilization Piedmont experienced from 1997 to 2005. Piedmont's market share of York County inpatient hospital services dropped from 64 percent in 2005 to fifty-five (55) percent in 2011. Tr. 453:20

– 25. This decline in patient volume occurred during a period when York County's population grew twenty-two (22) percent. Tr. 205:11 – 22.

22. The utilization data during this period reflect a direct correlation between Piedmont's York County patient loss and CHS' gain. From 2005 to 2010, Piedmont lost approximately two thousand two hundred (2,200) York County patient discharges. During the same period, Carolinas Medical Center and Mercy-Pineville increased York County discharges by a combined one thousand eight hundred (1,800) patients. Tr. 454:11 – 18. Thus, over eighty (80) percent of Piedmont's loss in York County patient volume from 2005 to 2010 was absorbed by CHS facilities. Tr. 455:2-9.

23. CHS owns a large network of employed physicians known as the Carolinas Physician Network (CPN). In February 2005 prior to the filing of CHS' CON application in this case, CPN employed twenty-five (25) physicians with offices in York County. Tr. 456:2 – 5. Within one month following CHS' submission of its application, in April of 2005, CPN added twelve (12) physicians to its network, bringing its total of employed physicians in York County to thirty-seven (37). Tr. 456:5 – 7. By 2012 the number of York County doctors working for CPN had grown to sixty-six (66), and at the time of the final hearing, the total number of CPN physicians employed in York County was between seventy and ninety (70 – 90). Tr. 214: 10 – 11; 1751: 1 – 4.

24. CPN physicians enter a uniform employment agreement that establishes the following requirements concerning patient referral practices:

> Referrals to CMHA Facilities. As a condition to the receipt of consideration provided for in this Agreement, Physician agrees to refer all patients in need of hospitalization, diagnosis or treatment on an outpatient or an inpatient basis to a facility owned, operated or managed, directly or indirectly, by CMHA and/or to a practitioner who is a member of the medical staff of any such facility (or any such practitioner's group practice) unless: (a) the patient expresses a preference for a different facility or practitioner; (b) the patient's insurer determines the facility or practitioner; or (c) the referral is not in the patient's best medical interests according to Physician's judgment. The above requirement shall not apply with respect to any ambulatory surgery center owned in part, directly or indirectly, by CMHA and in part by practitioners or group practices.

Piedmont ex. 25 at 1. In the absence of the above listed express exceptions, CPN physicians must refer their patients to CHS facilities or to physicians on the medical staffs of such facilities

who agree to admit the patients to such facilities. Tr. 457:6 – 11. During the period from 2009 to 2012, CPN referrals to CHS facilities and services increased more than four (4) times, from one thousand two hundred (1,200) referrals in 2009 to more than five thousand (5,000) in 2012. Tr. 462:3 – 5. Four CPN primary care offices in York County accounted for more than eighty (80) percent of the CHS referrals between 2009 and 2012. Tr. 463:7 – 15. One CPN cardiology practice in York County doubled its referrals to CHS hospitals from 1,200 cases in 2009 to two thousand four hundred (2,400) cases in 2012. Tr. 462:18 – 25.

25. After CHS filed its CON applications in April 2005, changes in their physician network strategies became evident.[7] CHS, which had owned physician practices in York County for an extended period, quickly expanded its employed physician network and began the process of changing physician referral patterns. Tr. 981:11 – 982:23. Many physicians resigned their staff privileges at Piedmont, including several who had held leadership positions. Tr. 986:4 – 982:21; Piedmont Ex. 26. By 2011, nearly all CPN physicians had resigned from Piedmont's medical staff. Tr. 285: 16-20; see Piedmont Ex. 27.

26. Piedmont utilization records demonstrate a direct correlation between these changes in CPN physician referral patterns and the reduction of services at Piedmont between 2005 and 2011. Piedmont's overall market share of inpatient acute hospital services for York County residents dropped eleven (11) percentage points from sixty-three (63) percent in 2005 to fifty-two (52) percent in 2011. In contrast, the market share for CHS facilities grew by twelve (12) percentage points, increasing from twenty (20) to thirty-two (32) percent. Tr. 486:10 – 18. Piedmont's market share of complex cases for more severely ill York County patients shows even greater changes. From 2005 to 2011, Piedmont's share fell from fifty (50) percent to thirty-six (36) percent. During that same period, CHS market share grew from approximately thirty (30) percent to forty-two (42) percent, reflecting the increasing number of CPN practice referrals discussed above. Tr. 487:7 – 22. As a result, by 2011 more residents of York County than stayed to receive complex services. Tr. 487: 22 – 24.

Impact of Proposed Projects

27. Piedmont projects a fifty-eight (58) percent occupancy rate for FMMC by its third year of operations. Tr. 1229:20-23. The projected occupancy rates of FMMC are consistent

[7] Presbyterian also altered its physician network strategies, however, because it has withdrawn as a party from this matter, this order makes no findings in that regard.

with similar facilities in the service area and the state. The only hospital in the service area is Piedmont Medical Center, whose occupancy rates for 2009 to 2011 were fifty-seven (57), fifty-eight (58), and sixty-two (62) percent, respectively. According to the 2012-2013 State Health Plan, the average occupancy rate for South Carolina hospitals from 2009 to 2011 was less than 58 percent, as was the average rate for hospitals in Region II, the region that includes York County. In addition to transferring some of Piedmont's existing patients to the new facility, Piedmont seeks to halt outmigration by expanding its emergency department, recruiting physicians, and building FMMC. Tr. 215:4 – 23.

28. CHS contends it will fill CMC-FM's beds by shifting York County patients it already serves at its existing facilities outside York County to its new facility. By shifting patients from its North Carolina hospitals to CMC-FM, CHS asserts it will take no additional patient volume or market share from Piedmont and have no other impact on Piedmont. Jt. Ex. 1-A at 20 (S-CHS-474); at 1232 (S-CHS0995); Tr. 1763:25 – 1764:7. Del Murphy, CHS' executive who drafted the CMC-FM application, testified that CHS' goal is not to increase its York County market share, but merely to maintain its current market share. Tr. 1764:13 – 22. In his trial testimony, Mr. Murphy attempted to make the distinction between a shift of market share and a shift of patients. Tr. 1759:11 – 1760:20. However, in his deposition, which was read into the record, Mr. Murphy blurred this distinction.

> **Q:** Is it Carolina's position that they will not take any more patients from Piedmont than they are currently taking? And your answer was what?
>
> **A.** Correct.

Tr. 1761:7-11. Additionally, CHS' expert, Dawn Carter, conceded that the assumption that CMC-FM would take no additional patients from Piedmont was "the basis of the projection in the [CHS] application." Tr. 2492:3-10.

29. The court finds CHS' assumption that it would take no patients or market share from Piedmont by operation of CMC-FM unreliable. Even if CHS had no desire to serve new patients, which seems implausible, it would not have the ability to control patient admissions into its proposed Fort Mill hospital. In addition to patients being admitted by its CHS-employed physicians, CMC-FM would also admit patients through its emergency department, as well as

through non-CHS physicians who would join hospital's medical staff and other independent physicians who would become exclusively affiliated with CHS. Tr. 521:7 – 23.

30. In 2012, the percent of emergency department admissions in CHS Charlotte area hospitals ranged from forty-five (45) percent at CMC-Mercy to approximately eighty (80) percent at CMC-Lincoln. Tr. 523:2 – 8. Roughly fifty (50) percent of the patients at CHS' hospital in Pineville, North Carolina (CMC-Pineville) were admitted through the emergency department. Tr. 523:8. These data demonstrate that, like other hospitals, CHS has no control over who presents at the emergency departments of its hospitals. Undoubtedly, some patients who will present at CMC-FM will be individuals who have historically used Piedmont. As CHS expert Dawn Carter acknowledged, "Usually a majority of inpatient admissions come through the emergency department." Tr. 2493:8 – 10. The proximity of CMC-FM's emergency department to Rock Hill would certainly attract Fort Mill patients who would otherwise go to Piedmont's existing facility and be admitted there.

31. Another way that Piedmont patients would shift to CMC-FM would be if non-aligned physicians who practice at Piedmont become aligned with CHS by employment or otherwise. Each of the three (3) physicians who are not contractually bound to any particular health care facility called as witnesses by Piedmont testified that they would obtain privileges at CMC-FM if it were approved. Although these physicians testified that they have had privileges at Piedmont for years and supported the approval of its application, they believed that patients they had served at Piedmont would want to be served at any new hospital that would be built in the Fort Mill area, irrespective of who established it. Tr. 148:13 – 149:8 (Adlakha); 296:4 – 15 (Taylor); 767:4 – 768:8 (Singhi). In order to maintain their relationship with those patients, the physicians expect to obtain privileges at the new facility so they can continue to serve the patients they have treated at Piedmont, even if the shift of patients to CMC-FM would have an adverse affect on Piedmont. *Id.* The testimony of these three practitioners was consistent with the reports received from Piedmont medical staff members by Piedmont experts David S. Levitt and Daniel J. Sullivan. Tr. 524:11 – 17.

32. The potential risk that Piedmont patients would shift to CMC-FM if non-contractually bound physicians who practice at Piedmont become aligned with CHS by employment or otherwise is more than merely speculative. One physician who testified at the hearing, Dr. Taylor, stated that his group, the oldest OB/GYN practice in York County,

discussed the prospects of employment with CHS, Piedmont, and other healthcare systems. Dr. Taylor continued by testifying that if his group, which provides over ninety-five (95) percent of Piedmont's OB/GYN services became employed with CHS, all of the group's patients, which are currently being treated at Piedmont, would be shifted to CMC-FM and other CHS facilities. Tr. 299:18 – 21. Similarly, another physician, Dr. Singhi, stated that his cardiology practice, Carolina Cardiology, has considered employment by both CHS and Piedmont. Tr. 773:19 – 774:21. Carolina Cardiology furnishes between eighty (80) and ninety (90) percent of the cardiology services at Piedmont. Dr. Singhi recognized the challenges that would exist if CMC-FM was approved that would not permit his practice to maintain its present status (e.g. being able to refer and admit patients to any facility to his choosing at which he has privileges). Tr. 773:19 – 774:7. If the Carolina Cardiology physicians become employed by CHS, Dr. Singhi acknowledged that CHS would expect his group to comply with the CPN physician network referral policy and transfer patients from Piedmont to CHS facilities. Tr. 778:11 – 25.

33. To the extent that CHS can control the facilities to which its affiliated physicians' patients are treated, the court finds that there is little incentive for CHS to simply shift existing patients to CMC-FM. CHS spent $300,000,000 recently doubling CMC-Pineville's bed size and adding many specialty services that duplicate Piedmont's. In its 2007 CON application in North Carolina, part of CMC-Pineville's justification for expanding was that it projected that over twenty (20) percent of its admissions would come from York County. Tr. 1189:1 – 20. From that, it is impossible not to recognize that CHS has every incentive to recoup its multi-million dollar capital investment by maximizing utilization at CMC-Pineville, and not shifting those patients to CMC-FM.

34. It would also be untenable for CHS to seek little or no incremental increase in utilization of its facilities in return for its more than $75,000,000 projected investment in CMC-FM. Merely serving the same patients that CHS already attends does not reflect sound business or healthcare planning principles. Tr. 518:5 – 12. This court cannot conclude that CHS, a highly successful business, would establish a new multi-million dollar facility in a new market without intending to serve any new patients, many of whom would inevitably be existing Piedmont patients. To conclude otherwise would be capricious.

35. CHS identified its incentive for establishing CMC-FM as not economic, but rather the need for additional capacity to relieve the utilization demands on the CHS Charlotte area

facilities. Tr. 2695:7 – 2696:25. Ms. Carter testified that CMC-FM would enable CHS to "decompress" utilization at CHS facilities, particularly CMC-Main. Tr. 2413:2 – 12. Mr. Levitt, however, countered that the effect of any relief provided to CHS' Charlotte area facilities by the redirection of York County patients to CMC-FM would be insignificant. Tr. 2696:11 – 25. Considering the effect on CMC-Main alone, the shift of York County patients from that facility to CMC-FM would affect only two and two-tenths (2.2) percent of the patient demand at CMC-Main. *Id.*

36. The evidence presented suggests that superior alternatives are available to CHS to decompress utilization at some of its facilities such as CMC-Main. Tr. 2697:12 – 19. Six (6) of the CHS Charlotte area hospitals consistently have had capacity to relieve CHS of its capacity constraints at CMC-Main. Tr. 2697:12-14. In 2009, CMC-Mercy was only forty-six (46) percent occupied. Tr. 2697:15-16. That same year, CMC-University, which is located in Charlotte very close to CMC-Main, was operating at forty-seven (47) percent capacity. Tr. 2698:3-7. Similarly, in 2011, the combined occupancy for CMC-Mercy and CMC-Pineville was 65 percent. Tr. 2697:16-17. The 2011 occupancy of CMC-University was 43 percent. Tr. 2698:6-7. Because CMC-Main draws from a large area, patients receiving care there from the communities served by CMC-Union, CMC-Kings Mountain, and CMC-Cleveland Regional[8] could be redirected to those facilities in the same way CHS is proposing to shift patients to CMC-FM. Tr. 2698:9-20. If the objective of CHS is to decompress utilization at CMC-Main, the availability of excess capacity at other CHS facilities is a superior alternative to expending large amounts of capital to construct a hospital in Fort Mill. Tr. 2698:24 – 2699:10.

Adverse Impact

37. Experts for Piedmont and CHS testified about two alternative methods for analyzing impact; the incremental (with and without) method, and the "lookback" method. The incremental method projects an existing provider's utilization and income at a future date under two alternative circumstances: first, with a new operational provider; and second, without a new provider. The lookback method reviews the existing provider's projected utilization and income at a certain future date, assuming the presence of the new provider's projected utilization and income at a certain date in the future, and assuming the presence of a new provider. Then, an

[8] In 2009, CMC-Cleveland Regional operated at 38 percent and CMC-Kings Mountain at twenty-eight (28) percent. Tr. 2552:25; 2554:12; 2557:18; 2558:9.

analyst looks back to the existing provider's utilization and income data at a specific point in time. Future projections are compared with the historical data to determine whether adverse impact would occur.

38. Piedmont's expert, Mr. Levitt, used the incremental approach in his adverse impact analysis. Mr. Levitt projected Piedmont's utilization and income in 2017 if CMC-FM were approved and operational. He compared those projections to Piedmont's projected utilization and income in 2017 without CMC-FM. He concluded that CMC-FM would cause an impact of three thousand seventy-six (3,076) fewer cases annually and $12,087,942 less annual income for Piedmont. Piedmont Ex. 104.

39. CHS experts argued that because of the proposed patient shift from CHS facilities in North Carolina to CMC-FM, construction of CMC-FM would have no impact on Piedmont. Alternatively, however, they advocated using the lookback method for analyzing impact. Employing that approach, Ms. Carter, one of CHS' experts, testified that CMC-FM would have no adverse impact on Piedmont. Tr. 2346:22 – 2348:13.

40. Mr. Sullivan, another of Piedmont's experts, criticized the lookback approach for failing to give effect to population growth.[9] By way of example, he discussed a hypothetical existing hospital (Hospital A) with a twenty (20) percent occupancy rate. A CON application for a new hospital (Hospital B) was approved in Hospital A's service area and, five (5) years later, Hospital A's occupancy rate remained at 20 percent. The lookback approach would conclude that no adverse impact had occurred, even though Hospital A's occupancy rate would have been forty (40) percent without Hospital B, due to high population growth in the service area. The incremental approach would take that fact into account and conclude Hospital A had been adversely impacted. Tr. 2834:2 - 2835:18.

41. Mr. Levitt's incremental method adverse impact analysis projecting a reduction in Piedmont's utilization of over three thousand (3,000) inpatient cases annually and over

[9] CHS questioned Mr. Sullivan's credibility because in March 2005 he was engaged by CHS to conduct a technical review of the 2005 CMC-FM application before it was submitted to DHEC. Tr. 1256 - 1263. Mr. Sullivan's role was very limited, however. Tr. 1261:25 – 1262:17. Moreover, the application he reviewed differed significantly from the application DHEC approved in 2011. For example, the 2005 application did not propose to shift all patients to be served at CMC-FM from existing CHS facilities. Tr. 1290:17 - 1291:4 (Sullivan); Tr. 1675:8 - 1676:11, 1677:11 - 1679.3; 1680:9 - 1681:11 (Murphy). Ms. Carter also contended that Mr. Sullivan's testimony was inconsistent with his testimony in a North Carolina CON case. The court finds that, based on Mr. Sullivan's explanation, the two cases are distinguishable and his testimony not inconsistent. Tr. 2843:1 - 2847:10.

$12,000,000 less annual income for Piedmont was based on an assumption that sixty-seven (67) percent of CMC-FM's patients would come from Piedmont. Tr. 649:21 – 650:4. Mr. Levitt also forecast the effect if half of CMC-FM's patients were to come from Piedmont. Under that scenario, the impact on Piedmont would be a loss of some two thousand (2,000) inpatient cases a year that would reduce Piedmont's income by approximately $8,000,000 annually. Tr. 2703:24 – 2704; *see* Piedmont Ex. 107.

42. CHS expert Kathryn Platt produced a similar result when she applied the incremental adverse impact model, although her assumption that Piedmont's losses would be proportionate to its market share reduced the degree of the adverse impact in comparison to Mr. Levitt's analysis. Under Ms. Platt's incremental analysis, Piedmont would lose one thousand six hundred twenty-three (1,623) patient cases a year, and suffer a negative financial impact of $6,500,000 annually. Tr. 2704:23 – 2271:8. Assuming CHS would shift existing patients to CMC-FM, Ms. Platt characterized her incremental analysis as a worst case scenario for Piedmont. Tr. 2270:23 – 2271:8. Ms. Platt also prepared a lookback adverse impact analysis that compared Piedmont's projected performance in 2017 with what it was in 2009. Under this analysis, which does not give effect to growth in demand or growth in population, Piedmont was projected to have only sixty-two (62) fewer patients in 2017 than it did in 2009. Tr. 2705:1-8.

43. Ms. Carter performed a similar lookback analysis, using more current baseline data from 2011 instead of 2009. Under Ms. Carter's lookback projection, Piedmont would lose six hundred seventy-six (676) inpatient cases each year that would have an adverse financial impact on Piedmont of $2,700,000 annually. Tr. 2705:10-19. Ms. Carter testified that even if Piedmont incurred losses projected by Mr. Levitt, that the impact would not be adverse, determining that the adjusted margins of two and one-tenth (2.1) percent to five and four-tenths (5.4) percent were within an acceptable range. Tr. 2436:14 – 2437:11. However, Ms. Carter's analysis only took into consideration the financial effect of Piedmont's loss of inpatient cases. In rebuttal, Mr. Levitt testified that the inpatient financial losses were so great that he did not quantify the additional loss of outpatient services Piedmont would incur. Tr. 2707: 6 – 15. However, after Ms. Carter testified that the financial impact of the projected inpatient losses was insignificant, Mr. Levitt calculated the additional loss of outpatient services. Using the same assumptions he applied to his original adverse impact analysis, Mr. Levitt determined that the outpatient impact ranged from a low of $5,500,000 applied to Ms. Platt's projection to a high of

$10,500,000. Tr. 2707:23 – 2708:10. When considered in the aggregate, the negative impact ranges from $12,100,000 for Ms. Platt's model to $22,300,000 for the highest projected loss calculated by Mr. Levitt. Tr. 2708:13 – 24.

44. Mr. Levitt measured the effect of these combined inpatient and outpatient financial losses against Piedmont's pre-tax income for 2009, 2011, and 2012. He used three (3) projected total losses: $22,300,000, based on the assumption that CMC-FM would take sixty-seven (67) percent of its patients from Piedmont; $15,000,000, based on the assumption that CMC-FM would take fifty (50) percent of its patients from Piedmont; and $12,100,000, based on the analysis performed by Ms. Platt that assumes Piedmont's losses would be proportional to its market share. Tr. 2709:10 – 2710:22. Mr. Levitt then applied those projected losses against Piedmont's pre-tax income, which was approximately $28,000,000 in 2009, $24,700,000 in 2011, and $36,000,000 in 2012, to determine the following percentages that the total projected losses represented of pre-tax income. Tr. 2709:15 – 21.

Financial Impact as a Percentage of Piedmont's Pre-Tax Income

Projected Total Losses	2009	2011	2012
$22,300,000	80%	90%	62%
$15,000,000	53.2%	60.2%	41.3%
$12,100,000	43.4%	49.1%	33.7%

Tr. 2709:22 – 2711:1.

Each of these sets of projections represents what this court finds would be a substantial and adverse impact on Piedmont. Tr. 2711:24 – 2712:1. The calculations, however, do not account for all of the potential adverse financial impact on Piedmont. They do not include effect of the loss of complex cases, such as cardiac and neurosurgical cases. Additionally, these projected losses are based on pre-tax income from 2009–2012. They are not adjusted for inflation to reflect the full extent of the projected losses in the event CMC-FM became operational after 2017. Tr. 2711:16 – 24. Ms. Carter criticized other aspects of Mr. Levitt's adverse impact analysis and projections.[10] One basis was her belief that Mr. Levitt overstated Piedmont's

[10] Though qualified as an expert in health planning, Ms. Carter could not recall ever doing an adverse impact

projected expenses for 2020, thereby decreasing its projected 2020 income and exaggerating the adverse impact. Tr. 2430:8 – 2432:17. Ms. Carter concluded that Piedmont projected a twenty-five (25) percent increase from its actual 2009 to its projected 2020 expenses at a time when its projected volume remained flat. Tr. 2431:11-16. However, in comparing Piedmont's 2009 actual expenses to its 2020 projected expenses, she mistakenly included bad debt as an expense item for 2020, but not for 2009.[11] Tr. 2783:22 - 2785:8; 2787:16 - 2788:4 (Masterton); Tr. 2510 - 2518 (Carter). As a result, Piedmont's expenses increased only fourteen (14) percent instead of 25 percent. Tr. 2789:2 - 2795:25. Once Ms. Carter's calculation errors taken into account, Mr. Masterton testified that the increase in expenses from 2009 to 2020 demonstrates Piedmont's ability to manage costs well. Tr. 2793:21 - 2794:2. Moreover, the corrections result in a projected annual after-tax loss for Piedmont in 2020 of approximately $18,000, a decrease from 2009 of over one hundred (100) percent. Tr. 2794:3-22.

45. Ms. Carter further criticized Mr. Levitt's adverse impact analysis by comparing York County with other South Carolina counties, where, according to Ms. Carter, hospitals were thriving. Tr. 2443:7-25. Ms. Carter contended that Piedmont would similarly thrive, despite the presence of CMC-FM. *Id.* However, as Ms. Carter conceded, one of the two hospitals in Spartanburg County is "less than well utilized." Tr. 2529:24 - 2530:25. The two existing hospitals in Anderson County are not competitors and historical outmigration from Anderson County is far less than in York County. Tr. 2524:1 - 2525:24, Piedmont Ex. 15. Lexington County, unlike York County (assuming CMC-FM is approved), has only one hospital. Tr. 2527:19-22. Moreover, Ms. Carter testified that was she unaware whether any providers in any of those counties had extensive physician networks comparable to the CHS network in York County. Tr. 2526:11-17; 2528:2-7; 2529:15-19; 2531:22 - 2532:5. Mr. Levitt and Mr. Sullivan testified that CMC-FM, in combination with CHS' growing physician network, would result in continued outmigration, particularly for specialty patients with complex medical needs who would be referred to CHS network hospitals such as CMC-Pineville and CMC-Main. Mr. Levitt testified that he analyzed the changes in Piedmont's market share in the complex cases of various product lines from 2005 to 2011. Tr. 506:22 – 507:21. These are cases that would be less likely

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analysis herself or even working on another case in which adverse impact was a major issue. Tr. 2504:10-20.

[11] Ms. Carter conceded she also mistakenly used $24,914,730 as the amount of Piedmont's 2009 bad debt, when the correct number was $26,292,000. Tr. 2507:3-2509:16 (Carter); Tr. 2785:9-13 (Masterton).

to be performed at small community hospitals, and would instead be referred to larger facilities such as the CHS-Charlotte area hospitals or Piedmont.

46. For complex cardiac catheterization and electrophysiology cases during this period, Piedmont's share dropped from seventy-six (76) percent to forty-two (42) percent, while CHS' more than doubled from fifteen (15) percent to forty (40) percent. Tr. 512:16 – 22. Similarly, an analysis of all complex heart-related procedures in 2005, including open heart surgeries, shows that Piedmont's market share was sixty (60) percent and CHS' was twenty-one (21) percent. By 2011, their market share was identical. Tr. 513:24 – 514:7. A review of complex surgery cases from the same time period shows a similar trend. Piedmont had a fifty (50) percent market share that was nearly twice that of CHS' share of twenty-eight (28) percent. By 2011, however, CHS' share of complex surgeries performed on York County residents exceeded Piedmont's share. Tr. 515:6 - 16. In six (6) separate service lines involving complex cases, including cardiac catheterization and electrophysiology, neurosurgery, vascular surgery, gynecological surgery, plastic surgery, and ENT surgery, Piedmont lost at least fifty (50) percent of its volume from 2005 to 2011. Tr. 516:3 – 22. In several other service areas, including cardiovascular medicine, Piedmont lost more than twenty-five (25) percent of its volume. Tr. 516:22 – 25.

47. The testimony of Arun Adlakha, M.D., in describing his practice's experience, is illustrative of the nature of the adverse impact that would occur on a broader scale to Piedmont and existing York County providers, including specialty physicians, if the CON were awarded to CMC-FM. Dr. Adlakha is a pulmonologist and a sleep disorder intensivist who is a partner in a Rock Hill-based pulmonology group. Tr. 116:17 – 118:12. Dr. Adlakha had a robust practice in 2009. Tr. 123:19. The demand for services was so strong that Dr. Adlakha planned to develop a lung cancer center at Piedmont, which he expected to be an extension of the services he provided with navigational bronchoscopy, a new invasive technology Piedmont acquired in 2009 at Dr. Adlakha's request. Tr. 132:6 – 134:7. The instrument, which cost $150,000, was the first in the greater Charlotte area and only the third in South Carolina. *Id.* When the equipment was first put into operation, Dr. Adlakha performed eight (8) to ten (10) procedures a month with it. Tr. 134:24. Shortly after the unit was put into service, however, the consults and referrals for patients who needed the procedure dropped significantly, reducing the number of cases to one or two a month. Tr. 134:9-13. The patient volume never returned. Dr. Adlakha made the decision

to terminate the use of the instrument as he found it "very difficult to maintain [his] proficiency and justify keeping it for so long." Tr. 134:13-15.

48. Dr. Adlakha's dramatic decline in demand for navigational bronchoscopy in 2009 coincided with an abrupt change in referral patterns that resulted in a drop of twenty-five to thirty (25 – 30) percent in total bronchoscopies. Tr. 126:20-24. The loss in referrals was attributable to the practices owned by the CHS physician network. Tr. 129:20-23. Dr. Adlakha's practice received no notice of the change in the referral practices, even though the members of Dr. Adlakha's practice had close professional and personal relationships with many CHS physicians. Tr. 130:11-17. Carolina Pulmonary Physicians had been the primary resource for the pulmonary and sleep consults for the CHS York County practices. Tr. 130:17-19. There was no other reasonable explanation that would account for the change in the CHS physicians' referral practices. Tr. 130:20-25.

49. The loss in so much volume of Piedmont's complex cases from 2005 – 2011, such as navigational bronchoscopy, lies in the changed relationships and referral patterns among CHS' York County primary care physicians. As Ms. Carter testified, "the most important factor in determining where a patient goes for specialty physician services is referral by their primary care physician." Tr. 2499:7-11. With its recent expansion, CMC-Pineville's specialty services now duplicate those of Piedmont's. Since 2005 CHS has increased the number of physicians it employs in York County by eighty-nine (89) percent. Tr. 214:4-14. Ms. Carter anticipates CHS will continue to acquire physician practices in York County if CMC-FM is constructed. Tr. 2494:13-22. Ms. Carter further testified that hospital systems employ physicians because they are referral sources. Tr. 2500:19 - 2501:3; 2501:12-17; 2502:12-18. CHS will be highly incentivized to encourage its employed physicians to continue to refer patients to CHS facilities and specialists, and have no inducement to refer patients to Piedmont facilities and specialists who have privileges with and practice at Piedmont. Tr. 2500:19 - 2501:17; 2502:12-18.

50. If CHS established CMC-FM, outmigration of complex specialty services such as Dr. Adlakha experienced would not only continue, but also would likely accelerate as a result of CPN physician referral practices. Piedmont's specialty programs, which require certain minimum volume levels to maintain quality and proficiency, as well as economic viability, would be jeopardized. Tr. 1202:16-19. Piedmont's CEO, William Masterton, testified that continued outmigration and patient volume loss could force Piedmont to reduce or eliminate

specialty programs and services as well as abate its workforce. Loss or paring of Piedmont's specialty programs would be detrimental to York County citizens, especially those living in the western, more rural part of the county farther away from CHS specialty facilities in North Carolina. Tr. 225:19 - 226:7; 1202:25 - 1203:7.

51. The court listened to extensive testimony about how hospitals profit through managed care, commercial insurance patients. Medicare is a parsimonious payor, Medicaid often pays providers below cost, and self-pay patients (uninsured patients whose income levels do not permit them to qualify for charity care), typically pay little or nothing. Tr. 1207:10 - 1208:5. Mr. Masterton testified that hospitals must use the margins they achieve from managed care, or privately insured, patients to subsidize the services they provide to uninsured and Medicaid patients.

52. Mr. Levitt testified that a hospital's payor mix is the key to its ability to cover the costs of services for those patients who are uninsured or whose insurers, such as Medicaid, pay limited reimbursement. To maintain services to medically underserved groups and to sustain profitability, a hospital must have a strong base of managed care and commercial patients. Tr. 640:4-20. From 2005 to 2011, Piedmont's payor mix changed significantly as CHS' market share of York County patients expanded. During that period, Piedmont's managed care patients declined sixteen (16) percent, while the number of Medicaid patients increased by the same 16 percent and charity care doubled. Tr. 639:9-23. The exchange of profitable patients for those whose insurance, if they have any, pays less than the costs of delivering services has a direct effect on a facility's profitability.

53. The construction of CMC-FM would further erode Piedmont's payor mix, as CHS physicians directed managed care patients from the relatively affluent Fort Mill area to CMC-FM and other CHS facilities, leaving a disproportionate number of uninsured, Medicaid, and Medicare patients for Piedmont and independent York County physicians. The effect on Piedmont and non-CHS practitioners would be to lower their profit margins and reduce resources thus jeopardizing their ability to care for medically underserved individuals and maintain their current level of services and job. Tr. 1205:22 - 1208:5.

54. During the staff review, fifty-nine (59) physicians practicing in York County who were not employed by an applicant submitted letters of support. Of these, forty-five (45) expressed support for Piedmont while one did for CHS. Tr. 681:5 – 10. Many of the physicians

who supported Piedmont also expressed concern about the effect of CMC-FM on Piedmont. Mr. Levitt reviewed these letters and interviewed, along with Mr. Sullivan, a number of the physicians who authored the letters. The following shared concerns were expressed by the physicians: (1) Piedmont's ability to maintain high standards of patient quality would be compromised; (2) CMC-FM and CHS physicians would refer patients needing specialized care to CHS physicians and facilities outside of York County; (3) the payor mix of Piedmont and its medical staff would be degraded; and (4) the healthcare delivery system in York County, including Piedmont and its medical staff, would be weakened. Tr. 683:16 – 685:1.

55. Three (3) York County physicians, who are not employed by or contractually bound to either applicant but who refer a majority of their patients to Piedmont, testified that if CMC-FM were constructed, it would adversely affect Piedmont. Dr. Adlakha testified that construction of CMC-FM would cause an even greater increase in the loss of Piedmont's outpatient and inpatient services than it has experienced in recent years. Tr. 146:11 – 19. He also testified that in his opinion the quality of care would be adversely affected: "the quality of any hospital or any individual [physician] is dependent on the quantity that they see, as well as the quality of cases that they see." Tr. 147:14 – 17. As a result, it would be difficult to maintain the same scope and quality of pulmonary services at Piedmont if CMC-FM were approved. Tr. 146:23 – 147:2.

56. Another physician, Dr. Norman Taylor, testified that the approval of CMC-FM would cause a further deterioration of Piedmont's payor mix as well as the payor mix of his practice thereby decreasing the percentage of patients who are payors. Tr. 292:5 – 7. Under such circumstances, the quality of care at Piedmont would suffer and the ability to recruit new physicians would be impaired. Tr. 289:1 – 290:1; 291:22 – 292:5.

57. Among the greatest threats to Piedmont is that if CMC-FM were approved it would reduce the volume of services referred to non-contractually bound specialists on the Piedmont medical staff and degrade the payor mix of those practices to the point where the practitioners would have little choice but to join the CPN network to maintain their financial viability. Doctors Taylor and Singhi testified that their practices would have to give serious consideration to becoming employed by the CHS physician network if CMC-FM was constructed. Tr. 778:11 – 25. Dr. Taylor further testified that since his practice is the principal provider of OB/GYN services at Piedmont, if the physicians in his practice became employed by

or contractually bound to CHS and shifted their patients to CMC-FM and other CHS facilities, it would likely force the closure of Piedmont's Women's Tower, which would cause the hospital to lose its neonatal service. Tr. 299:18 – 300:3. Mr. Masterson testified that the affiliation of more noncontractually bound physicians currently practicing at Piedmont with CHS would be devastating to Piedmont's utilization. Tr. 223:8 – 224:3.

58. Mr. Levitt testified that as Piedmont lost patient volume to CMC-FM, its cost per unit of service would increase. While Piedmont could reduce some costs tied directly to the delivery of services that it would no longer provide, such as supplies and medications, it would be unable to control other fixed costs. Lower patient utilization would cause an increase in the cost per unit of services to cover Piedmont's fixed costs. Tr. 686:15 - 24.

59. Mr. Mr. Masterton testified that building FMMC was the crucial in Piedmont's strategy to halt to halt outmigration of patients out of York County, Tr. 253:4-12. Mr. Sullivan agreed:

> Without Piedmont having a physical presence in the Fort Mill market, I don't see them being able to effectively reverse the outmigration that's occurred over the last seven years . . . . CHS . . . has dramatically expanded Pineville. It offers a broad range of services equivalent to what Piedmont does. They've effectively penetrated the physician market . . . . [W]ithout having a physical presence [in Fort Mill] that would attract patients to the facility and give Piedmont a base on which to recruit additional physicians . . . I don't think that any other strategy is going to have any significant impacts in terms of changing the outmigration problem.

Tr. 1200:2-18.

60. Ms. Brandt disagreed with Piedmont's strategy, opining that FMMC would actually harm Piedmont, while CMC-FM would not. Jt. Ex. 1-B at 1011. The court finds no support for Ms. Brandt's position. Piedmont has experienced a significant amount of its market share shift to CHS since 2005 without a CHS hospital in Fort Mill. The court is persuaded by Mr. Sullivan's opinion that CMC-FM would effectively segregate much of Northern York County from Piedmont. Tr. 1198:8-13. Allowing the construction of FMMC versus CMC-FM, thereby permitting FMMC to shift some of its patients there along with 36 of Piedmont's unused beds, would result in reversing much of the ongoing outmigration from York County and would be a far better outcome for all York County residents who would have even easier accessibility to healthcare in the county without and degradation in existing services. Tr. 1197:10 - 1199:11.

Bed Need and Projections

61. The methodology by which acute care hospital bed need is determined in the State Health Plan is a function of the utilization of particular hospitals, and not the utilization of residents of a county. Tr. 442:17 – 25. In the 2004-2005 Health Plan, DHEC projected York County would need two hundred eighty-eight (288) beds, including two hundred sixty-eight (268) acute beds plus twenty (20) beds for psychiatric services. Tr. 484:1 – 3. Because of considerable outmigration, the bed need for all York County residents is greater than the bed need for patients who receive care at Piedmont. Adjusting the methodology in the Health Plan to take into consideration the use by York County residents of hospital services, regardless of where they received the services, results in a need for four hundred ninety-one (491) beds. Tr. 481:18 – 483:25. After taking into consideration the 288 Piedmont beds, a need exists for two hundred three (203) additional beds to serve York County residents who have been leaving the county for hospital services.

62. Piedmont and CHS base their respective projections of bed need on similar assumptions about the distribution of utilization throughout York County. Tr. 2674:3 – 11. Piedmont assumed twenty-nine (29) percent of its beds would be used by residents of the Northern York County area; CHS assumed thirty (30) percent. Both parties assumed twenty-three (23) percent of their beds would be used by residents from the greater Rock Hill area. CHS projected a somewhat greater utilization by residents of the Western York area: eight and one-tenth (8.1) percent compared to three (3) percent for Piedmont. Tr. 2674:11 – 23. Based on these assumptions, projections of the bed need distribution within York County relied on by each applicant are consistent. Tr. 2674:23 – 25.

63. CHS relied on its utilization projections to demonstrate the need for its 64 bed facility. The critical element of its projections was the assumption that it would redirect substantial portions of its market share of York County patients to CMC-FM – seventy-five (75) percent of Northern York County, eighty-five (85) percent of greater Rock Hill, and fifty (50) percent of Western York County. Tr. 675:21 – 2677:5. To calculate the projected utilization, CHS applied its 2009 market share to the CMC-FM utilization forecasts. Tr. 2676:5 – 6. Mr. Levitt testified that even if CHS' assumptions were accurate, applying CHS' more recent market share would show that the 64 bed facility would be inadequate. From 2009 to 2011, CHS' market share of York County patients continued to grow. Tr. 2676:15 – 16. Applying the higher

2011 market share to CHS' assumptions about the extent to which it expected patients to be redirected to CMC-FM would result in an occupancy rate of over eighty-eight (88) percent by 2017. Under CHS' utilization model, occupancy would exceed ninety (96) percent by 2020. Tr. 2676:16 – 20.

64. Based on this updated calculation, CHS would need ninety-five (95) beds at CMC-FM. Tr. 2677:19 – 23. If, however, CMC-FM were to take market share from Piedmont, which this court has found is a reasonable eventuality, it would need even more beds. To illustrate the point, Mr. Levitt testified that if CMC-FM were to increase its market share by five (5) points, the facility would be one hundred eight (108) percent occupied by 2017. Tr. 2679:20 – 21. The proposed 64 bed CMC-FM facility would be inadequate to meet the projected bed need.

65. Because of the growth projections in Northern York County, the hospital in Fort Mill should be designed to respond to the increased demands that will be placed on the facility over time. FMMC is designed to accommodate up to two hundred fifty (250) beds. Tr. 2667:6 – 22. CMC-FM's design, however, envisions a potential future expansion of only eighteen (18) to twenty (20) beds. Tr. 2628:5 – 20. The CMC-FM design contains no empty space reserved for future expansion (shell space). Tr. 2567:24 – 2568:3. CHS presented no evidence of other space it could convert to accommodate additional space in the event of expansion. Adding additional beds would require construction, which would be expensive and potentially disruptive. Tr. 1228:15 – 17. Adding beds would also require an additional CON, which could be expensive and time-consuming. Tr. 2568:15 – 2569:3.

66. Piedmont's proposal is intended primarily to meet the needs of residents leaving the county by establishing 100 beds at FMMC. Even with the transfer of the 36 beds, Piedmont would have more than seventy (70) empty beds available on an average day. Piedmont, therefore, would be able to accommodate significant spikes and fluctuations in occupancy that occur in York County throughout the year. Tr. 1224:21 – 1225:19.

67. During the DHEC staff review, CHS presented a model in support of its contention that a 64 bed facility was needed in the Fort Mill area, and not the 100 bed hospital Piedmont proposed. Based on the data it presented, CHS argued that Piedmont's transfer of 36 beds to FMMC in Northern York County results in a "tremendous maldistribution" of hospital

beds in York County with a disproportionate number of beds in Northern York County that would restrict access for patients in the rest of the county. Tr. 2659:23 – 2660:1.

68. Beverly Brandt, DHEC's CON Director at the time of the agency's decision, relied heavily on CHS' maldistribution model in presenting the grounds for her decision, stating that she was concerned with the effect of Piedmont's proposal on the "balance of the distribution [of beds] to the target population." Tr. 2663:20 – 2664:3. Her analysis of the applications used virtually the same language advanced by CHS in finding that "the replacement/relocation of the 36 beds in Northern York County does not appear to equitably distribute beds within the county and reduces accessibility to greater Rock Hill and Western York." Tr. 2662:12 – 16; Jt. Ex. 1-B at 1007.

69. Mr. Sullivan identified two principal flaws in the CHS model. First, at the time the model was prepared the 2010 census data was not published. Tr. 1220:7 – 22. Additionally, Mr. Sullivan noted that Ms. Platt failed to incorporate a new Northern York County zip code, 29707, that would be part of the new hospital's primary service area. Tr. 1219:12 – 1220:7. Since the development of CHS' model projections, the 2010 census shows that its model understated the population in Northern York County. Tr. 1220:5 – 7. The updated census shows the population in the Fort Mill area to be significantly higher in 2015 than the assumptions upon which CHS and DHEC were relying in finding a 100-bed facility would disproportionately allocate beds to Northern York County. Tr. 1220:12 – 1222:10.

70. The more reasonable period for projecting the bed-to-population ratio would be in 2020, not 2015. Tr. 1221:3 – 22. Updated population estimates based on the most recent census project that the three zip codes in Northern York County are expected to grow at over twice the rate of the greater Rock Hill and Western York County areas. Tr. 2664:25 – 2665:18. These official population projections demonstrate that the location of a 100-bed hospital in Northern York County would result in an equitable distribution of beds and will better meet the need for a new hospital in the Fort Mill area.

71. Piedmont projects a fifty-eight (58) percent occupancy rate for FMMC by its third year of operations. Tr. 1229:20-23. Ms. Carter testified this occupancy rate was too low to justify project approval. Tr. 2549:19-22. However, CHS itself operates several facilities at occupancy rates below 58 percent. Tr. 2552:25; 2554:12; 2557:18; 2558:9. Mr. Carter, as well as another CHS expert, Mr. Murphy, agreed that all of these CHS hospitals were successful. Tr.

1693:25 - 1694:2; 2558:21-24. It is clear that hospitals can operate efficiently and in a financially feasible manner at a 58 percent occupancy rate. Tr. 1230:13-16. Moreover, Northern York County is a higher growth area with an expanding population that will result in an increased demand for hospital services in the future. Tr. 1230:21 - 1231:8.

72. The projected occupancy rates of FMMC are consistent with similar facilities in the service area and the state. The only hospital in the service area is Piedmont Medical Center, whose occupancy rates for 2009 to 2011 were fifty-seven (57), fifty-eight (58), and sixty-two (62) percent, respectively. Tr. 694:12-16. According to the 2012-2013 State Health Plan, the average occupancy rate for South Carolina hospitals from 2009 to 2011 was less than 58 percent, as was the average rate for hospitals in Region 2, which includes York County. Tr. 2549:24 – 2551:9; 694:4-7.

73. Piedmont's projected occupancy rate is more reasonable than CHS', which projects that CMC-FM will achieve a third-year occupancy rate of sixty-eight (68) percent. Tr. 1228:19-20. A seventy (70) percent occupancy rate is an indicator that expansion may be needed, especially in a smaller hospital. Tr. 1228:23 - 1229:10. A 64-bed hospital with a 70 percent occupancy rate has only 18 beds to accommodate occupancy spikes and fluctuations in need. Tr. 1228:3-10.

74. Piedmont's representatives testified that its strategy to halt outmigration has three (3) components: expand its emergency department, recruit physicians, and, most importantly, build FMMC. Tr. 215:4-23. The emergency department is significant because sixty-nine (69) percent of Piedmont's inpatients access the hospital through its emergency room. Tr. 218:8-11. DHEC recently approved a CON for Piedmont to double the size of its ER, a project that will be completed in 2014. Tr. 218:1-21. Physician referrals are another important source of inpatient volume. Tr. 213:19-20. Piedmont currently employs thirty-two (32) physicians and plans to recruit fourteen (14) more in 2013. Tr. 217:5-10.

75. FMMC would provide Piedmont with a second emergency department and would enhance Piedmont's ability to recruit physicians. Tr. 217:11-21. Prior to accepting the CEO position at Piedmont, Mr. Masterton served as CEO for Coastal Carolina Hospital (Coastal) in Hardeeville. Tr. 179:12-14. Tenet acquired Coastal with the goal of halting outmigration and that goal was accomplished. Tr. 253:1-14. Like FMMC, Coastal is located near an interstate close to a county line and state border. Tr. 2797:17 - 2798:16. Just over the county line are

competing hospital systems in the area of Savannah, Georgia. Tr. 2798:16-20. During Mr. Masterton's three (3) year tenure at Coastal, outmigration declined and Coastal's market share increased over fifty (50) percent. Tr. 181:8-21; 2799:2-5.

76. Coastal's experience is typical of that of other satellite hospitals in South Carolina. Virtually all of the parent facilities of satellites in South Carolina are tertiary hospitals that provide specialized services, as does Piedmont. Tr. 1074:20 - 1075:11. Parent facilities develop satellites as a strategy to recover or grow market share, just as Piedmont plans to do with FMMC. Tr. 1073:17 - 1074:14; 539:2-19.

77. Georgetown Hospital System (Georgetown) is an example of how satellite hospitals can strengthen a parent hospital's performance. Georgetown opened Waccamaw Community Hospital (Waccamaw) in 2003 in Northern Horry County to stem outmigration and the loss of market share to Horry County facilities. Tr. 542:18-12. According to Mr. Levitt, who serves as a healthcare planning consultant for Georgetown, Waccamaw has had a "tremendous positive impact" on Georgetown. Tr. 541:8-11; 547:1-14. That effect was achieved as a result of the increased utilization of the system as a whole. It was also due to the increase in referrals of Waccamaw area patients to Georgetown for more complex services not provided at Waccamaw. Tr. 547:18 – 548:3. As a result of the high demand in northern Georgetown County, Waccamaw grew from a forty (40) bed facility when it opened in 2003 to one hundred twenty-four (124) beds in 2008. Tr. 553:14-22; 557:19-23.

78. The parallels between the market pressures faced by Georgetown and Piedmont are remarkable. Both hospitals were losing market share in a high growth and affluent region of their respective county to larger urban centers. Tr. 557:23 – 558:3. Both hospitals faced competition from larger and more sophisticated healthcare systems that were aggressively pursuing strategies to increase the shift of market share. Tr. 556:4-16. Like Georgetown, Piedmont has recognized that by establishing a satellite hospital in the community where outmigration was occurring, it would improve accessibility, meet the growing needs of the area, and, through that community presence, recover the market share it had lost. Tr. 558:4 – 559:19.

79. Piedmont's projected market share assumes that with the presence of FMMC in Northern York County that it could return approximately to the share it had in 2003-2004. Tr. 559:8-12; 561:1-7. The only material differences in the historic and projected market shares are in the three zip codes in Northern York County where Piedmont historically has not had a large market share. Tr. 563:17. With the location of FMMC in Northern York County, Piedmont assumed that would change, projecting shares comparable to the market share Piedmont has in the immediate area where it is located. Tr. 563:19 – 564:9.

80. CHS argued that Piedmont's projected market shares for FMMC were unreasonable, contending that patients from Rock Hill zip codes (29730 and 29732) would not go to FMMC. Jt. Ex. 1-A at 56-57 (S-CHS-53-54). Ms. Brandt agreed, noting it was unreasonable "to assume a patient choosing to use Piedmont's services will drive past the main hospital to receive care at FMMC." Jt. Ex. 1-B at 1007. However, in many portions of 29730 and 29732 residents could travel to FMMC without having to drive past Piedmont. Ex 111. Robert Walsh, Piedmont's transportation engineering expert, testified that the most expeditious route for residents of these zip codes to take to FMMC was I-77. Tr. 241:9 - 343:22. Mr. Walsh conducted a series of travel time studies that showed that for a large portion of 29730 and a small portion of 29732 it took less driving time to drive to FMMC than Piedmont. Piedmont Ex. 111; Tr. 349:14 - 352:2. Mr. Walsh also found that while the drive to Piedmont would be quicker for significant portions of the zip code, the time saved would be ten minutes or less.[12] Tr. 349:14 – 352:2.

81. Overall, Piedmont's market share assumptions are reasonable and achievable. Tr. 564:20 – 565:2. The court finds reasonable its assumption that with the addition of its new Fort Mill area hospital, it will be able to restore the market share it lost since 2004.

Access to Medically Underserved

82. DHEC requires CON applicants to project the level of charity care they will provide to be expressed as a percentage of its projected gross revenue. 24A S.C. Code Ann. Regs. 61-15 § 202(2)(c)(1)(d). After a CON is approved and a project is implemented, however, DHEC does not verify whether the applicant actually meets its charity care projections. Tr. 1241:25 – 1242:11.

[12] On cross, CHS counsel suggested Mr. Walsh had inappropriately conducted travel time studies on Memorial Day, but Mr. Walsh clarified that, while his staff had conducted some of the studies during the month of May, they had not conducted any on Memorial Day. Tr. 420:11-21.

83. In their 2005 submissions, the applicants projected charity care levels consistent with one another. Piedmont projected it would provide charity care valued at three (3) percent of its gross revenue.[13] Tr. 1246:9. CHS projected charity care for CMC-FM that equaled three and five-tenths (3.5) percent of its gross revenue. Tr. 1244:7 – 13. In its October 4, 2010 updated application, Piedmont again projected 3 percent. However, when CHS submitted its updated projections in December 2010, it increased CMC-FM's charity care projection to six and three-tenths (6.3) percent. Tr. 1244:15 – 17.

84. Northern York County is the most affluent area of one of the most affluent counties in the state. Tr. 1235:16 – 19. For example, the percentage of patients from Northern York County on Medicaid is less than one-half that of Medicaid patients from the rest of the county. Tr. 1236:14 – 25. In 2011, only five and five-tenths (5.5) percent of the hospital patients from Northern York County were self-pay or charity patients, as opposed to nine and five-tenths (9.5) percent from the rest of York County. Tr. 1237:16 – 1238:12; Piedmont Dx 234.

85. Donald G. Stewart, the CHS planner who developed the 6.3 percent projection, testified that he based the new projection on 2009 internal financial reports of CMC-Pineville and CMC-University, another CHS hospital. Tr. 1860:18 – 1861:4. Mr. Stewart did not consider York County employment data, income data, CPN physician data, data from recently built South Carolina hospitals, or data from cost reports. Tr. 1863:7 – 1866:12.

86. The internal data on which Mr. Stewart relied showed CMC-Pineville's 2009 gross revenue to be $385,034,797. Piedmont Ex. 83 at 3 (S-CHS-1205). The 2009 gross revenue for CMC-University was $382,847,000. S-CHS-1293. Mr. Stewart testified that the same data showed that in 2009, CMC-Pineville provided $19,486,000 in charity care [five and one-tenth (5.1) percent of its gross revenue] and CMC-University provided $31,042,000 in charity care [eight and one tenth (8.1) percent of its gross revenue]. Tr. 1829:21 – 22. The weighted average of these percentages was 6.3 percent, the number Mr. Stewart projected for CMC-FM. Tr. 1860:24 – 1861:15.

87. The source of the data Mr. Stewart relied upon were reports by CHS' vendor, PeopleSoft. Tr. 1875:10 – 21; 1883:5 – 9. The PeopleSoft reports showed different charity care amounts than those used by Mr. Stewart. PeopleSoft reported CMS-Pineville's 2009 charity care

[13] In 2011, Piedmont's actual charity care equaled three and eight-tenths (3.8) percent of its gross revenue.

at only $510,847. Tr. 1878:10 – 11. Similarly, the PeopleSoft report for CMC-University listed its 2009 charity care at only $2,173,922. CHS 1293.

88. The PeopleSoft reports classified uncompensated care into five (5) different categories: charity care, Mecklenburg County inpatient contractual adjustments, bad debt expense, bad debt recovery, and self-pay discount. Tr. 1876:20 – 1877:1. CHS later reclassified the status of many patients from bad debt or self-pay amounts to charity care. CHS made these reclassifications at various times. Sometimes CHS would reclassify a patient as charity care during his or her hospital stay, and at other times the reclassification did not occur until after discharge. Tr. 1877:23 – 1878:9; 1878:23 – 1879:3; Tr. 1880:11 – 20; 1881:18 - 24; 1883:14 – 1884:5. After the reclassifications, CMC-Pineville's 2009 charity care jumped from $510,847 to $19,486,000 and CMC-University's from $2,173,922 to $31,042,000. Tr. 1829:21 – 22; 1878:10 – 16.

89. Federal law requires all health care providers who participate in the Medicare program to submit an annual cost report. Tr. 1239:3-5. The provider must certify the accuracy of the information in the report and there are civil and criminal penalties associated with providing false information. Tr. 1239:18-24. Cost reports are prepared after the end of the reporting year, following any reclassification of accounts. Tr. 2848:14-22. Table S10 in the cost report shows the provider's gross revenue and gross charity care. Tr. 1240:2-8.

90. CMC-Pineville and another CHS facility, CMC-Mercy, operate under a single license and therefore file a consolidated cost report. Tr. 1240:12-17. On the Pineville-Mercy consolidated cost report, those two facilities reported $1,213,654,912 of gross revenue and $30,948,212 of charity care. Piedmont Exs. 75-78, 81, Piedmont Dx 200. The charity care amount for inpatients and outpatients combined is only two and six-tenths (2.6) percent of the gross revenue reported. *Id.;* Tr. 1240:21-23; Tr. 2850:18-24.

91. DHEC accepted CHS' projection that 6.3 percent of CMC-FM's gross revenue would be provided to charity care patients. In accepting CHS' charity care projection for CMC-FM, Ms. Brandt gave no weight to the historical experience of CMC-Pineville or CMC-Mercy, or to the demographics of York County.

92. Piedmont introduced evidence from multiple sources that showed CHS physicians based in York County place restrictions on the acceptance of medically underserved patients. These patients include uninsured patients, Medicaid patients, and, in some cases, Medicare

patients. The effect of these restrictions by CHS-owed physician practices has not only limited access of medically underserved individuals to primary medical care but also, would limit access of those same individuals to non-emergency admissions at CMC-FM, which would be heavily dependent on CHS-employed physicians. Tr. 577:9 – 12; 17 – 24.

93. This court is persuaded by the illustrative evidence demonstrating the relatively low provision of Medicaid and uninsured care by CHS York County practices. CHS records reflect that in 2012, Medicaid patients of Medical Associates of Fort Mill represented only three-tenths (0.3) percent of all patients of the office. For Medical Associates of Rock Hill in 2012, Medicaid patients represented a mere one-tenth (0.1) percent of all patients of that office. A similar pattern exists at Shiland Family Practice, another York County primary care CPN practice: one (1) percent Medicaid patients at the Rock Hill office and six-tenths (0.6) percent Medicaid patients in Shiland Family Practice's Fort Mill office. Similarly, the percentage of Medicaid patients of the Sanger Clinic, a CHS-owned cardiology group that serves York County patients, was equally low and consisted of one and five-tenths (1.5) percent in its Fort Mill office and one and six-tenths (1.6) percent in its Rock Hill office. The percentage of uninsured patients served in these practices in 2012 was significantly below the 6.3 percent charity care projection provided by CHS for the CMC-FM facility, which actually ranged from one and three-tenths (1.3) to two and five-tenths (2.5) percent.

94. In contrast, the current Medicaid participation of Dr. Adlakha's pulmonology practice is fifteen (15) percent and of Dr. Taylor's OB/GYN practice is fifty (50) percent. Piedmont's payor mix reflects the heavier charity and Medicaid load that its medical staff members carry. In 2011, nearly eleven (11) percent of Piedmont's patients were classified as self-pay or charity in contrast to six (6) percent of York County patients served by CHS who were self-pay or charity. The pattern is substantially the same for Medicaid patients from York County, which constituted eleven (11) percent of the payor mix for CHS in 2011, and eighteen (18) percent for Piedmont. Based on the evidence provided, this court finds little support for CHS' projected charity care as 6.3 percent. First, CHS nearly doubled its projection for charity care from 3.5 percent in 2005 to 6.3 percent in 2010. Second, the CHS hospitals have an average charity care of approximately four and five-tenths (4.5) percent, with the highest being five (5) percent at CMC-Main in Charlotte. York County has one of the highest median household incomes in South Carolina and Fort Mill is the most affluent area within York County based on

median household income. Given that CMC-FM will be situated in this affluent area, it is not realistic to believe that CMC-FM's charity care percentage in Fort Mill would be higher than the charity care percentage at its main hospital in downtown Charlotte.

95. Telephone surveys of CHS primary care physician practices conducted by Mr. Levitt in July 2011 and again in February 2013 produced results demonstrating the restrictions on the acceptance of medically underserved patients by those CHS practices. The July 2011 survey focused on the two CHS York County primary care physician practices, Shiland Family Medicine and Medical Associates of Rock Hill and Fort Mill. These practices operate in four (4) locations in Rock Hill and Fort Mill and represent eighty (80) percent of the York County patient referrals to CHS facilities. Tr. 580:25 – 581:10. The 2011 survey revealed that Shiland Family Practice was not accepting new uninsured, Medicaid, or Medicare patients. Tr. 581:10-14. *Also see* Jt. Ex. 1B, p. 782. The survey also showed that Medical Associates of Rock Hill and Fort Mill were not accepting new uninsured patients unless the patient paid in advance seventy (70) percent of a new patient charge that ranged from two hundred ninety dollars ($290) to eight hundred dollars ($800). Tr. 581:14-20. Mr. Levitt's February 2013 survey revealed no changes at the practices, which were still not scheduling appointments for new Medicaid or Medicare patients. Tr. 599:16 – 600.

96. The information obtained from CHS primary care offices was also consistent with records produced by CHS that show relatively low percentages of Medicaid and uninsured care by CHS York County practices. CHS records show that in 2012, Medicaid patients of Medical Associates of Fort Mill represented three-tenths (.3) percent of all patients of the office. Tr. 604:1 – 5; CHS Ex. 27 at 1 (S-CHS-9841). For Medical Associates of Rock Hill in 2012, Medicaid patients represented one-tenth (.1) percent of all patients of that office. Tr. 604:6 – 8; CHS Ex. 27 at 1. A similar pattern exists in the other CPN York County primary care practice, Shiland Family Practice: one (1) percent Medicaid patients at the Rock Hill office and six-tenths (.6) percent Medicaid patients in Shiland's Fort Mill office. Tr. 604:9 – 14; CHS Ex. 27 at 1. Similarly, the percentage of Medicaid patients of the Sanger Clinic, a CHS-owned cardiology group that serves York County patients, was equally low, consisting of one and one-half (1.5) percent in its Fort Mill office and one and six-tenths (1.6) percent in its Rock Hill office. Tr. 605:2-13; CHS Ex. 27 at 1. The percentage of uninsured patients these same practices served in

2012 was also low, ranging from one and three-tenths (1.3) to two and one half (2.5) percent. CHS Ex. 27 at 1.

97. The number of Medicaid patients served by these York County CHS physician practices is substantially lower than it would be in the absence of restrictive patient-acceptance practices. Tr. 607:1 – 608:3. For example, the current Medicaid participation of Dr. Adlakha's pulmonology practice is fifteen (15) percent and of Dr. Taylor's OB/GYN practice is fifty (50) percent. Tr. 127:19-24 (Adlakha); 263:13 – 264:1 (Taylor).

98. Piedmont's payor mix reflects the heavier charity and Medicaid load that its medical staff members carry. In 2011, nearly eleven (11) percent of Piedmont's patients were classified as self-pay or charity in contrast to six (6) percent of York County patients served by CHS who were self-pay or charity. Tr. 621:1-17.

99. Because the CHS primary care practices are not accepting new Medicaid patients and have not accepted them for at least two years, York County Medicaid patients would not have access to CHS primary care physicians. Tr. 609:23 – 610:3. These Medicaid patients would also not be in a position to receive referrals to CHS specialty physicians who would be responsible for admitting patients to CMC-Fort Mill. Tr. 610:3-4. The CHS primary care physicians would function as the gatekeepers for CMC-Fort Mill. Tr. 610:4-6. If the flow of medically underserved patients into CHS primary care offices is restricted, the referrals and ultimate admissions of those individuals into CMC-Fort Mill would be restricted as well.

Financial Considerations

100. Joel Grice, a thirty (30) year veteran and former director of DHEC's CON division, testified that the function of the financial project review criteria has been to evaluate the financial feasibility of proposed projects by considering the reasonableness of proposed revenues and expenses. Instead of measuring applicants' projections against each other because of the variability of assumptions and the potential for one applicant making adjustments in *pro forma* budgets to gain a competitive advantage over another, DHEC has historically evaluated the reasonableness of financial projections based on existing projects it has approved. Tr. 1133:22 – 1137:16.

101. DHEC found that Piedmont and CHS' proposed charges that were comparable to other facilities in the service area or the state. Mr. Levitt and Mr. Grice testified that they agreed with DHEC's finding. Tr. 692:1 – 4; 1133:2 – 9.

102. In identifying total capital costs for FMMC, Piedmont projected its costs differently from CHS. To accurately compare the projected costs of the two projects, they needed to be based on the same factors. Mr. Levitt testified that he made the following adjustments to FMMC's total project costs to achieve that effect: (1) he excluded capitalized interest as had CHC; (2) he eliminated an inflationary factor for future construction cost that CHS had not included; and (3) he applied a large volume purchaser discount on medical equipment available to Tenet or CHS, rather than list equipment cost at retail charges. The adjusted total capital cost for FMMC was reduced from $146,000,000 to $119,800,000. Tr. 702:2 – 4.

103. The total project cost per bed for the 100 bed FMMC is $1,200,000 per bed. For CMC-FM, the total project cost per bed is $1,200,000. The costs per bed proposed by Piedmont and CHS are consistent with those experienced by similar facilities constructing new satellite and replacement hospitals. In 2008, Ms. Brandt, as director of the CON division, approved applications for two satellite hospitals, Trident-Berkeley and Roper-Berkeley, at a projected cost of $2,300,000 per bed. Tr. 703:7 – 8. CHS is an owner of the Roper St. Francis HealthSystem that filed the Roper-Berkeley CON application. Another CHS-affiliated satellite hospital, Roper Mt. Pleasant, was approved in 2005 at a cost of $1,500,000 per bed. Tr. 703:17 – 25. Without adjusting for inflation, the cost per bed for some new hospitals have been lower than those projected by Piedmont and CHS, but overall the capital costs of the proposed projects are reasonable when compared with the costs of similar facilities. Tr. 703:6. Neither DHEC nor CHS presented any evidence that addressed the issue of whether the total capital costs of the proposed projects are consistent with those of similar facilities.

104. Mr. Levitt also compared the proposed operating costs of FMMC and CMC-FM with other satellite hospitals that have been approved by DHEC. He demonstrated how CMC-FM's projected 2010 operating costs are comparable to those approved for Roper Mt. Pleasant in 2005, without adjusting for inflation. Mr. Levitt also demonstrated how FMMC's 2010 proposed operating costs without adjusting for inflation were consistent with the 2006 operating costs of Palmetto Parkridge. Mr. Levitt concluded that the projected total operating costs were reasonable and consistent with those approved for existing facilities. Tr. 709:7 – 13. CHS presented no evidence addressing the operating costs of similar facilities other than its own.

105. DHEC found, and this court agrees, that Piedmont and CHS' proposed charges were comparable to other facilities in the service area or state.

106. FMMC and CMC-FM respective proposed budgets reflect a positive increase in each hospital's financial performance over the first three years of operation. FMMC's financial performance improves from a deficit of $5,400,000 in the first year of operation to more than $300,000 in net income by its third year of operation. CMC-FM projects net income of $663,000 in its first year, climbing to over $2,700,000 by its third year of operation. Tr. 711:15 – 22.

107. Mr. Levitt compared the projected financial performance of Roper-Berkeley and Trident-Berkeley, the two hospitals whose CON applications were most recently approved, with FMMC and CMC-FM. The projected performances of these projects are comparable to FMMC's projected performance, but not to CMC-FM's projected financial performance. Roper-Berkeley, a project of Roper St. Francis HealthSystem that is owned in part and managed by CHS, actually showed a loss of nearly $15,000,000 over its first three years of operation, far greater than those projected by FMMC. However, DHEC found the Roper-Berkeley project had sufficient net income and was financially feasible. Tr. 712:14 – 24. Trident-Berkeley's financial performance projections were consistent with those projected by FMMC, and were likewise found to be financially feasible by DHEC. Tr. 712:1 – 7.

108. Mr. Grice examined a broader selection of projects, including all new hospital CON applications filed and approved since 2005. He testified that it is very common for new hospitals to incur losses in the first year or two of operation. Tr. 1150:15 – 25. In reviewing competing applications, Mr. Grice testified that he has never found one applicant more financially feasible than another if it shows a positive trend by the third year. Tr. 1151:23 – 1152:10. There is no issue as to whether either applicant will be able to build and sustain their respective projects. Tr. 1152:11 – 17.

109. Both applicants appear to be committed to funding their respective projects. CHS proposed to use cash to finance the construction of CMC-FM. Tr. 715:17 – 20. Piedmont presented a letter from its parent corporation, Tenet Healthcare Corporation, stating that the company would fund the project and finance it "with the most appropriate and cost-effective capital structure at the time utilizing existing cash reserves, existing lines of credit, or the

issuance of debt or equity." Tr. 714:13 – 715:1. Both financing proposals are reasonable, and both applicants are financially able to build the projects.

110. This court finds that it is more efficient to build a 100 bed hospital capable of meeting future need for services than to build a 64 bed facility that requires expansion within a few years of opening. When expansion is needed to accommodate the projected growth in Northern York County, FMMC would be in the better position to respond. FMMC is designed for a capacity of up to 250 beds. Tr. 2667:6 – 22. CMC-FM's design, however, would permit expansion of no more than 20 beds for a total of 84 beds. Tr. 2628:5 – 20. Without the availability of shell space to accommodate the growth, bed expansion at CMC-FM would be more expensive and less efficient than at FMMC. Tr. 2567:25 – 2568:3; 2568:15 – 2569:3.

111. CHS argues that its proposal is more efficient because it projects fewer Full Time Equivalent (FTE) staff per adjusted occupied bed (AOB) than Piedmont. Tr. 2603:19 – 2604:3. CHS contends that CMC-FM will employ only three and one-tenth (3.1) total (clinical and non-clinical) FTEs per AOB while FMMC will employ four and two-tenths (4.2). Tr. 2603:19 – 2604:3. However, CHS would employ an unknown number of offsite staff that would provide services to CMC-FM. In calculating its FTEs per AOB, CHS failed to take into account the additional cost of this offsite staff. Tr. 1892:1 – 22; 2604:4 – 15; 2605:8 – 23; 2607:6 – 11.

112. Ms. Carter testified that CMC-FM's proposal was also more efficient because it had a higher percentage of patient care space than Piedmont's facility. Tr. 2596:17 – 2597:7. There is no standard definition of what constitutes patient care space versus non-patient care space, and Ms. Carter could not recall whether certain areas were classified as one or the other, although she testified that kitchens, chapels, and shell space could be examples of non-patient care space. Tr. 2597:8 – 2598:11. Therefore, under Ms. Carter's approach, hospitals with no kitchens, chapels or shell space would be considered more efficient than hospitals with such areas. This court finds this proposition incongruous.

Public Support and Opposition

113. DHEC received more than five thousand (5,000) letters of support for Piedmont, and thirty-four (34) letters of opposition. Ex. 1-B at 1011; Tr. 2611:17 – 22. A number of the Piedmont support letters were critical of CHS, but were not counted by DHEC as opposition letters to CHS. DHEC also received more than five thousand (5,000) support letters for CHS and

no letters of opposition. Tr. 2612:3 – 12. Some of the CHS letters of support were critical of Piedmont, however, these were likewise not counted by DHEC as opposition letters to Piedmont.

CONCLUSIONS OF LAW

Based upon the above findings of fact, the court concludes the following as a matter of law:

1. The ALC has jurisdiction over this contested case proceeding pursuant to S.C. Code Ann. § 44-1-60(F) (Supp. 2006) and § 1-23-600(A) (2005). In DHEC permitting cases, the Administrative Law Judge is the finder of fact. *Brown v. S.C. Dep't of Health & Envtl. Control,* 348 S.C. 507, 560 S.E.2d 410 (2002). This court's review of a DHEC decision on a CON application is *de novo*. *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 595 S.E.2d 851 (Ct. App. 2004).

2. The State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. §§ 44-7-110 to -394 (CON Act), requires a person or health care facility to obtain a CON before undertaking the construction or establishment of a new health care facility, including a hospital. S.C. Code Ann. §§ 44-7-130(10), -160(1) (Supp. 2010).

3. The purposes of the CON Act are "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State." S.C. Code Ann. § 44-7-120 (2002).

4. DHEC is responsible for administering the CON program in South Carolina. S.C. Code Ann. § 44-7-140 (2002). As such, DHEC's duties include promulgating regulations, S.C. Code Ann. § 44-7-150(3) (2002), and preparing a South Carolina Health Plan, S.C. Code Ann. § 44-7-180(B) (Supp. 2010).

5. DHEC promulgated Regulation 61-15 in order to administer the CON program to achieve the purpose of the CON Act. Regulation 61-15 § 802 sets forth thirty-three (33) project review criteria applicable to CON applications. These criteria fall into five (5) general categories: (1) need for the proposed project; (2) economic considerations of the project; (3) the project's impact on the resources of the health care system; (4) suitability of the site of the project; and (5) certain special circumstances. S.C. Reg. 61-15 §§ 801-802. During the application review process, DHEC establishes the relative importance of these project review

criteria and notifies each applicant of the ranking. S.C. Code Ann. Regs. 61-15 §§ 304, 801(2). While a project does not have to satisfy every project review criterion to be approved, no project may be approved unless it is consistent with the South Carolina Health Plan. S.C. Code Ann. Regs. 61-15 § 801(3); *see also* S.C. Code Ann. Regs. 61-15 § 802(1) ("proposal shall not be approved unless it is in compliance with the South Carolina Health Plan").

6. In determining whether to grant or deny a CON application, DHEC evaluates the proposed project under the project review criteria found in Regulation 61-15 § 802 and under the policies and standards in the applicable State Health Plan. S.C. Code Ann. § 44-7-210(C). Pursuant to the CON Act, the Department may not issue a CON to an applicant "unless the application complies with the South Carolina Heath Plan, Project Review Criteria, and other regulations." S.C. Code Ann. § 44-7-210(C); *see also MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 9, 664 S.E.2d 471, 475 (2008) (holding that compliance with the State Health Plan and the Project Review Criteria are independent requirements for approval of a CON).

7. In the case of competing applications, DHEC must award the CON, if appropriate, to the applicant who most fully complies with the requirements, goals, and purposes of the CON Act, the State Health Plan, the project review criteria, and other applicable regulations. S.C. Code Ann. § 44-7-210(B); S.C. Code Ann. Regs. 61-15 § 307(2). Here, Piedmont, CHS, Presbyterian, and HPA filed competing CON applications to provide similar services or facilities in the same service area. *See* S.C. Code Ann. § 44-7-130(5) (2002); S.C. Code Ann. Regs. 61-15 § 103(6). DHEC granted CHS' application to construct a 64 bed general acute hospital in York County.

8. Piedmont timely filed a request for contested case hearing challenging DHEC's decision to approve CHS' CON application. As a result, Piedmont, as the moving party, bears the burden of proof in this contested case. *See Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue). Therefore, Piedmont must prove by a preponderance of the evidence that DHEC erred in approving CHS' CON application. *See Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding that the standard of proof in an administrative proceeding is generally the preponderance of the evidence); *Nat'l Health Corp. v. S.C. Dep't of Health &*

Envtl. Control, 298 S.C. 373, 379, 380 S.E.2d 841, 844 (Ct. App. 1989) (stating that the preponderance of the evidence standard applies in CON disputes).

9. At the contested case hearing before this court, the issues to be considered are limited to those presented to or considered by DHEC during the staff review and decision-making process. S.C. Code Ann. § 44-7-210(E). As long as no new issues are considered in these contested case proceedings, any evidence pertinent to the issues considered by DHEC staff may be considered by this court. *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 578-79, 595 S.E.2d 851, 854 (Ct. App. 2004).

10. This court must consider the South Carolina Health Plan in effect at the time the CON applications were filed and may also consider the South Carolina Health Plan in effect at the time of this decision. S.C. Code Ann. § 44-7-225 (Supp. 2010). Thus, this court must consider the 2004-2005 South Carolina Health Plan and may also consider the 2012-2013 South Carolina Health Plan. Both of these plans were admitted as evidence at the contested case hearing.

11. The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Furthermore, a trial judge who observes a witness is in the best position to judge the witness's demeanor and veracity and to evaluate the credibility of his testimony. *See, e.g., Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); *Wallace v. Milliken & Co.*, 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990).

12. Under Rule 702 of the South Carolina Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." An expert is granted wide latitude in determining the basis of his opinion, and where an expert's testimony is based upon facts sufficient to form an opinion, the trier of fact must weigh its probative value. *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997).

13. "[E]xpert testimony is essential in cases which involve a subject of special technical science, skill, or occupation of which the members of the jury or the trial court are not presumed to be specially informed." 32A C.J.S. *Evidence* § 729, at 85 (1996). For example, the

South Carolina Supreme Court has held that in medical malpractice cases "the plaintiff must use expert testimony . . . unless the subject matter lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." *Pederson v. Gould,* 288 S.C. 141, 143, 341 S.E.2d 633, 634 (1986).

14. In general, "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence ... [;] the triers of fact cannot, and are not required to, arbitrarily or lightly disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding to the contrary of the opinion." 32A C.J.S. *Evidence* § 727, at 82-83 (1996). However, the trier of fact may give an expert's testimony the weight he or she determines it deserves. *Florence County Dep't of Soc. Servs. v. Ward,* 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). Further, the trier of fact may accept the testimony of one expert over that of another. *See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.,* 308 S.C. 216, 417 S.E.2d 586 (1992).

15. The parties do not dispute DHEC's findings that Piedmont and CHS equally meet the following project review criteria:

1	Compliance with the State Health Plan
3c	Location allows for timely delivery of necessary support services at a reasonable cost
3e	Documentation of means by which persons will access services
6a	Proposed/comparable charges
7	Consistent with similar facilities
13a	Successful operations and management experience
13b	Ability to obtain financing
13d	Record of compliance
4a	Support of affected persons
4c	Possible transfer agreements

With there being no evidence in the record to the contrary, the court concludes that DHEC did not err in finding that Piedmont and CHS equally met these Project Review Criteria.

Need (2a, 2b, 2c, 2d, 2e, 3a)

16. Project Review Criteria 2a requires identification of the target population while Criteria 2b requires projections of anticipated population changes to be reasonable and based upon accepted methodologies.

17. Project Review Criteria 2c requires that the proposed project provide services that meet an identified need of the target population, and Project Review Criteria 2e provides that the projected utilization should be sufficient to justify the implementation of the proposed service.

18. Expert witnesses presented by both parties agreed on one core issue: a need exists for a new hospital in Northern York County. No consensus was reached, however, on the fundamental question presented whether that need is for CHS' 64 bed facility or Piedmont's 100 bed facility. As noted in the Findings of Fact, this court was persuaded that Piedmont proved by a preponderance of the evidence that a 100 bed hospital would better meet the needs of the residents of York County than the 64 bed facility CHS proposed. CHS relied on its maldistribution theory during staff review as the primary basis for challenging the need for Piedmont's larger facility. However, when updated census data were applied to its methodology during trial, it revealed that the beds in York County would be more equitably distributed through the FMMC 100 bed hospital than they would by the construction of CMC-FM. FMMC's capacity to expand to 250 beds in the future also demonstrates that it would be better positioned to meet the needs of the rapidly growing Fort Mill area than CMC-FM. CMC-FM's own projections show that, by the third year of operation, it would be operating at an occupancy level that would justify the approval of new beds, but with little shell space available to it for expansion. These projections are further evidence that CHS' proposed facility would be too small to fully meet the demand.

19. In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of the outmigration, which are detailed in the relevant Findings of Fact and are incorporated herein, reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of FMMC would strengthen the capacity of existing York County providers to meet those needs. For these reasons, Piedmont best meets § 802.2 (a, b, c, e).

20. Project Review Criteria 2d addresses the reduction, relocation, or elimination of a facility or service. Since only Piedmont's application proposes to relocate beds, the applicability of this criterion is limited to Piedmont. The court finds that the transfer of 36 beds to FMMC will not adversely affect the population served at Piedmont because even with the transfer of the

36 beds, Piedmont would have more than 70 available beds on an average day. The court further finds that these beds will be better utilized at FMMC.

21. Project Review Criteria 3a provides that unnecessary duplication of services will not be approved. The court concludes that Piedmont's transfer of 36 beds would not unnecessarily duplicate services, but rather it would redeploy beds to an area of greater need in the county. Therefore, the court concludes that both applicants equally meet this criteria.

Access to Medically Underserved (3b, 3d, 3f, 3g)

22. DHEC accepted CHS' projections that CMC-FM would provide charity care equaling 6.3 percent of its gross revenue. The State Health Plan defines indigent care, also referred to as charity care, as

> medical care (measured in dollars) provided to an individual who has been determined to be unable to pay for this care prior to admission in non-emergency situations, and as soon as possible but before the discharge in emergency situations and for which only one billing has occurred and no other efforts have been undertaken to collect such debt. Indigent care does not include debt; contractual adjustments; or care that is reimbursed by a governmental program (Medicare, Medicaid, County indigent care program), church, or philanthrophic organizations.

2004-2005 State Health Plan at I-5, I-6.

23. Project Review Criterion 3b requires that the project should be located so that it may serve medically underserved areas. The court concurs with the Department that both applicants equally meet this criteria.

24. Project Review Criterion 3d requires that the proposed facility should not restrict admissions. DHEC found that Piedmont and CHS equally met this criterion. However, CPN internal records suggest CPN practices in York County limit access for indigent, Medicaid, and even Medicare patients. Whereas Piedmont and the non-contractually bound physicians who have privileges there do not. The court finds that this criteria is best met by Piedmont.

25. Project Review Criterion 3f directs that applicants should address the extent to which all residents of the area, particularly low income and medically underserved residents are likely to have access to the proposed facility.

26. CHS' proposed charity care does not meet the definition quoted above. Mr. Stewart's testimony and CHS internal documents reveal that CHS' charity care projections include large amounts of bad debt that CHS reclassifies as charity care. Contrary to the State Health Plan's requirements, these reclassifications occurred before, during, and after patients' hospital stays.

27. As discussed in the Findings of Fact, the greater weight of the evidence suggests CMC-FM's charity care will be significantly less than 6.3 percent of its gross revenue. This is substantiated by past cost reports filed by CHS for CMC-Pineville and CMC-Mercy, indicating those hospitals provided charity care valued at 2.6 percent of gross revenue.

28. Additionally, while the court finds that both applicants addressed the issue of availability of care for indigent residents in the county, the Findings of Fact reflect the court's concern that the practices of physicians affiliated with CHS via CPN would limit non-emergency access to CMC-FM. Therefore, the court finds that Piedmont better meets Criteria 3f.

29. Project Criteria 3g requires applicants to ensure that individuals in need of treatment have access to appropriate care, regardless of their ability to pay. The court finds that both applicants meet this criteria.

Adverse Impact (16c, 22, 23a, 23b, 3h)

30. The most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of the Project Review Criteria on adverse impact.

31. At trial, Piedmont's witnesses objected to DHEC's exclusion of Criteria 3h and the relative low ranking that DHEC gave Criteria 23a and 23b. S.C. Code Ann. § 44-7-210(E) limits the issues to be considered at the contested case hearing to those presented to or considered by DHEC during the staff review and decision-making process. By failing to raise the issues related to the exclusion and importance of certain Project Review Criteria to DHEC prior to the contested case, Piedmont cannot raise these objections in the contested case. Accordingly, the court rejects Piedmont's arguments that DHEC erred in failing to consider Criterion 3h and in ranking Criteria 23a and 23b as among the least important criteria in its review. As a result, the court will consider these criteria according to the ranking established by DHEC in its letter of March 27, 2006. This does not require the court to ignore Criterion 3h but

rather, that the court should give no greater weight to this criterion than it does to any of the other criteria that were not specifically listed in DHEC's ranking.[14]

32. The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated per unit cost per unit of services associated would increase. As a result, the operation of CMC-FM would have an adverse effect on existing providers. For that reason, Piedmont best meets § 802.16(c).

33. Project Review Criterion 22 requires that the proposed project's effect on the distribution of health services should be carefully considered to functionally balance the distribution to the target population. The court concludes that the operation of CMC-FM would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents of York County. Section 802.22 calls for an evaluation of the effect of the proposed facility or service not only on Piedmont but also on other healthcare providers. Letters from over forty (40) physicians to DHEC during its staff review as well as the testimony of the three physicians is compelling evidence that the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of CMC-FM. Piedmont best meets § 802.22.

34. Criterion 23a requires the consideration of the impact on the current and projected occupancy rates or use rates of existing facilities and services, weighed against the increased accessibility offered by the proposed services. 803(23)(a). For reasons detailed in the Findings of Fact of this Order, this court finds the position asserted by CHS and DHEC that by shifting patients from CHS facilities outside of York County, CMC-FM will cause little, if any, adverse impact on Piedmont to be unsound. CHS lacks both the incentive and the ability to accomplish such a shift or to control admissions to CMC-FM. Although CMC-FM will undoubtedly serve CHS patients, the court finds Piedmont has proven, by a preponderance of the evidence, that CHS would continue to acquire market share from Piedmont if CMC-FM were established. This would be accomplished through services provided by CMC-FM, as well as by the increased outmigration of patients to CHS facilities outside of York County for more specialized services.

[14] Ms. Fechtel's letter of March 27, 2006, explained that all other relevant criteria—the criteria not specifically listed in the letter—would be given equal importance. Thus, any criteria that was not listed but was relevant to consideration of the CON applications would be given equal importance.

35. Given the rapid population growth projected for Northern York County, the court concludes that the incremental approach is more reliable than the lookback approach in calculating CMC-FM's impact on Piedmont. Under the incremental approach, Piedmont would lose from one thousand six hundred (1,600) to three thousand (3,000) inpatients per year. When the loss of outpatients is projected, the total annual lost income caused by the operation of CMC-FM would range from $12,000,000 to $22,000,000, depending upon which expert's analysis is considered. This court is persuaded by the analysis of other courts which have found that significantly smaller losses constitute adverse impact. *See e.g., Lexington County Health Servs. Dist., Inc. v. DHEC*, 04-ALJ-07-0365-CC, 2006 WL 2899943 (ALC Sept. 15, 2006) ($3.2-$4.5 million annual loss to Palmetto Health is adverse impact); *Edisto Surgery Center v. DHEC*, 1998 WL 404373 at 17 (ALC, July 2, 1998) (annual loss of $2.7 - $3.1 million would be substantial negative impact on The Regional Medical Center of Orangeburg and Calhoun Counties). Moreover, Piedmont's projected loss represents between thirty-three (33) and ninety (90) percent of its annual pretax income. *See Marlboro Park Hosp. v. DHEC*, 2000 WL1274366 at 9 (ALC, July 27, 2000) [a thirty-two (32) percent reduction in pretax income constitutes substantial adverse impact]; *see id.* (a reasonable profit is necessary for hospitals to make capital investments such as new equipment).

36. The court finds that CHS's proposal does not meet Project Review Criterion 23a and that Piedmont's does meet it.

37. Criterion 23b requires that the staffing of the proposed hospital should be provided without unnecessarily depleting the staffing of existing hospitals or services. Piedmont presented evidence CMC-FM would have a negative impact on Piedmont's ability to staff its existing facility. It argued that because a large percentage of Piedmont's staff, especially nursing staff, currently live in Northern York County or Mecklenburg County, CMC-FM's relative proximity to their homes could pose a significant threat to Piedmont's ability to retain or recruit a substantial portion of its workforce. Tr. 224:4-23; 688:8-15. However, none of the witnesses testifying for Piedmont on this issue could provide the court with specific examples of what staff might be depleted, or the degree they might be depleted. Mr. Masterton, Piedmont's witness, acknowledged that he could not quantify what, if expenses, salaries, staff, and services might have to be reduced. Tr. 224:4 - 226:7; 2830:25 – 2831:6. The court finds that the position

of Piedmont too speculative to support a finding that the construction of CMC-FM would deplete its staff. Therefore, both parties equally meet Criterion 23b.

Financial Feasibility (6b, 9, 15, 16a, 17)

38. The court concludes that Piedmont and CHS equally meet Regulation 61-15 § 802(6)(a), as the proposed changes of both applicants are "comparable to those changes established by other facilities for similar services within the service area or state." Piedmont and CHS also equally satisfy Regulation 61-15 § 802(7), as their projected expenses are "consistent with those experienced by similar facilities." The court also agrees with Piedmont and CHS that Project Review Criterion 16b is not applicable.

39. Project Review Criterion 6b requires that projected levels of utilization should be consistent with those experienced by similar facilities and consistent with the need of the target population. As described in the court's Findings of Fact, CMC-FM will be well-utilized, however, with its smaller size and a projected occupancy rate approaching seventy (70) percent in its third year of operation, CMC-FM may need to expand to meet the growing needs of rapidly expanding Northern York County. FMMC's projected levels of utilization are lower, with a projected occupancy rate of 58 percent in its third year of operation. However, evidence was presented that FMMC's projected occupancy rates were consistent with similar facilities in the service area and the State. Additionally, FMMC's proposed larger size, created by the transfer of 36 beds from Piedmont to FMMC, places it in a better position to accommodate the expanding population of fast growing Northern York County. For these reasons, this court concludes that both Piedmont and CHS equally meet Project Review Criterion 6b.

40. Both applicants equally satisfy Regulation 61-15 § 802(9), as both show an improvement in net revenue over the course of time. Both equally satisfy Regulation 61-15 § 802(15), as both have projected the immediate and long-term financial feasibility of their projects. Id. Both applicants equally satisfy Regulation 61-15 § 802(16)(a), in that both have identified feasible methods of funding.

41. Section 802(17) provides that "[t]he proposed project should improve efficiency by avoiding duplication of services, promoting shared services, and fostering economies of scale." Piedmont better satisfies this criterion because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will FMMC's 100 beds better accommodate future growth, FMMC is better designed for expansion than is CMC-FM.

Public Support and Opposition (4b)

42. Both applicants equally comply with Regulation 61-15 § 802(4)(b), which requires consideration of whether documented opposition exists to a proposed project. Both submitted over 5,000 letters of support. While DHEC counted 34 letters of opposition to Piedmont, it did not count as opposition a number of letters from physicians both supporting FMMC and opposing CHS.

Conclusion

43. Piedmont and CHS both presented outstanding cases. DHEC conducted a thorough review process for the applications. DHEC staff asked numerous questions of both applicants seeking additional information and held a project review meeting to thoroughly discuss and understand the proposed projects. The Project Review Criteria Analysis was thorough and detailed. This court finds that the Department properly reviewed and analyzed both applications. To the extent that the court disagrees with certain aspects of Ms. Brandt's analysis, it was persuaded by the testimony of Mr. Grice, an expert with three decades of institutional knowledge and history with DHEC's CON program.

44. This court concludes that either hospital would promote cost containment. Both applicants have the ability to access cash to build its facility. Although the total cost to build FMMC is higher than the cost to build CMC-FM, the court concludes the per bed cost of the two facilities is comparable. Because the need for 100 beds has been established, the greater cost necessary for the construction of the larger facility is an imperative expenditure that meets the public need. Another factor contributing to the greater cost required to construct FMMC is that it is designed to accommodate growth of up to 250 beds, while CMC-FM is designed to add no more than 20 beds.

45. This court concludes that neither proposed Fort Mill area hospital would unnecessarily duplicate the services provided by Piedmont. Moreover, Piedmont has justified the transfer of 36 beds as a reasonable use of those resources to address the growing demand for healthcare services in Northern York County.

46. This court concludes that the establishment of FMMC will best serve the public needs by reducing the outmigration of York County residents to hospitals beyond York County, and in so doing, will strengthen the existing healthcare system in York County that consists largely of Piedmont Medical Center and non-contractually bound physicians on the Piedmont

medical staff. Approval of Piedmont's application will help stem outmigration and maintain quality of care, while approval of CHS' will escalate outmigration and lead to an erosion of quality of care in York County, especially for specialty services. For all these reasons, FMMC will better serve public needs than CMC-FM.

47. This court concludes that either applicant would be capable of providing high quality healthcare services at its proposed Fort Mill area hospital. One of the principal differences between the applicants is that the approval of CMC-FM would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of FMMC will ensure that high quality services continue to be provided and added within York County.

48. Piedmont made a proffer of evidence on the "bed need" issue identified in this court's Order on Motion in Limine date April 5, 2013 and Piedmont's argument in the prior contested case hearing before Judge Matthews. I conclude that Judge Matthews' prior ruling is dispositive of this issue.

49. CHS made a proffer of evidence on the "competing applicant" issue identified ion this court's Order on Motion in Limine dated April 5, 2013 and CHS' argument in the prior contested case before Judge Matthews. I conclude that Judge Matthews' prior ruling is dispositive of this issue.

50. Due to the enormous amount of discovery involved in this case, the large volume of evidence gathered and presented, and the occurrence of unforeseen but unavoidable delays associated with the hearing, the court finds substantial cause justifying the issuance of the final decision in this matter falling outside of the eighteen (18) month timeline set forth in S.C. Code Ann. §44-76-220(g)(Supp. 2013).

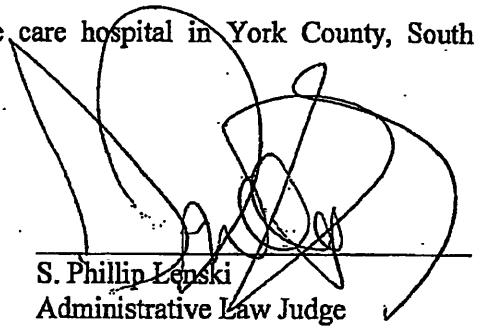
ORDER

After careful review of the evidence presented in this matter, and based upon the findings of fact and conclusions of law stated above, the court finds that Piedmont's application to establish FMMC most fully complies with the State Health Plan, the Project Review Criteria, and

the purposes of the CON Act and, therefore, should be approved while CHS' application to construct CMC-FM should be denied.

IT IS HEREBY ORDERED that the Department shall issue the CON application to Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center for the purpose of building a 100 bed general acute care hospital in York County, South Carolina.

AND IT IS SO ORDERED.[15]



S. Phillip Lenski
Administrative Law Judge

December 15, 2014
Columbia, South Carolina

[15] The court gave careful consideration to all of the issues raised by CHS in its Motion for Reconsideration in drafting this Amended Final Order. To the extent that any issues raised in the Motion for Reconsideration are not specifically addressed in this Amended Final Order, the court found them to be without merit.

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

December 15, 2014
Columbia, South Carolina

FILED
DEC 15 2014
SC ADMIN. LAW COURT

The South Carolina Court of Appeals

Grand Strand Regional Medical Center, LLC,
Respondent,

v.

South Carolina Department of Health and Environmental Control, Respondent below.

Grand Strand Regional Medical Center, LLC,
Respondent,

v.

South Carolina Department of Health and Environmental Control and Carolina Regional Cancer Center,
Respondents below,

of whom Carolina Regional Cancer Center is the Appellant.

Appellate Case No. 2014-000973

ORDER

The South Carolina Department of Health and Environmental Control (DHEC) granted Carolina Regional Cancer Center (Appellant) a Certificate of Need (CON) to add a linear accelerator to a proposed radiation cancer treatment facility in Conway. At the same time, DHEC found competing—and denied—a CON application by Respondent, Grand Strand Regional Medical Center, LLC, seeking to add a linear accelerator facility to its hospital campus in Myrtle Beach. On appeal to the Administrative Law Court (ALC), the ALC reversed DHEC's decision in part, finding the applications were not competing and both Appellant and Grand Strand should be granted a CON.

Appellant appealed the ALC's decision granting Grand Strand's CON. As required by section 44-7-220(B) of the South Carolina Code (Supp. 2014), Appellant posted a bond with this court in the amount of $489,431.25, which represents an amount equal to five percent of the total cost of Grand Strand's project. Section 44-7-220(B) further provides, "If the Court of Appeals affirms the [ALC]'s decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal."

Appellant subsequently filed a petition for supersedeas and requested panel review of a single judge's order denying the petition. We granted panel review and held a hearing on February 25, 2015. Appellant asks the court to stay the ALC's order granting a CON to Grand Strand pending the resolution of the appeal. In its filings and in its arguments before the court, Appellant argued (1) it was entitled to a stay under Rule 241(c)(2), SCACR; (2) this court should read a mandatory stay into section 44-7-220(B) because without a stay, the statute produces absurd results contrary to the CON Act's purposes; and (3) unless a stay is imposed the appeal bond provision unconstitutionally curtails Appellant's right to judicial review, violates procedural and substantive due process, and violates the constitutional guarantee of equal protection. After careful consideration, we deny the petition for supersedeas.

Appeals from administrative tribunals are exceptions to the automatic stay requirement of Rule 241(a) of the South Carolina Appellate Court Rules. Rule 241(b)(11), SCACR. However, a supersedeas may be ordered pursuant to Rule 241(c), SCACR. The rule provides that "[i]n determining whether [a supersedeas] should issue . . . [we] should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. We find there is no danger the court will lose jurisdiction or the issues on appeal will become moot if Grand Strand is allowed to proceed with its project. *See S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Grand Strand acknowledges that if it were to proceed with construction of its facility, it would have to cease all operations related to its project if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

Appellant asserts it will face "severe consequences" if Grand Strand is allowed to begin operating its linear accelerator services on its hospital campus "just three miles away from Appellant's existing operations" because referral patterns among doctors in the area will change. We find Appellant has not established that a stay is necessary to prevent irreparable harm to its referral base. Briefing is complete in the case and Grand Strand confirmed during the hearing that it has not yet begun its project, which is scheduled to take eighteen months. Therefore, even if Grand Strand were to begin its project today, this court will likely decide the merits of the appeal before the completion of Grand Strand's project and thus, well before area doctors begin to change their referral patterns.

Appellant further argues section 44-7-220(B) yields an absurd result, contrary to the CON Act's purpose, if a mandatory stay is not required in exchange for it posting a bond, "[d]espite the lack of the word 'stay' in the . . . bond provision." However, our rules of statutory construction do not allow courts "to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." *Consumer Advocate for the State of S.C. v. S.C. Dep't of Ins.*, 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) (alteration in original) (quoting *Kinard v. Moore*, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951)). Section 44-7-220(B) contains no requirement that a mandatory stay be issued in conjunction with the filing of the appeal bond, and we decline to insert such a requirement into the statute.

Appellant also asserts this court may reject the plain language of the statute if abiding by it would render it unconstitutional. *See Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the [l]egislature or would defeat the plain legislative intention."). Here, Appellant argues there can be only two justifications for awarding the appeal bond to Grand Strand if its CON is upheld: (1) to compensate Grand Strand for delay costs caused by the appeal, or (2) to deter and punish Appellant for appealing. If Grand Strand proceeds with its project, unencumbered by a stay, it will incur no delay costs, and in that situation, Appellant argues the appeal bond provision becomes punitive, violating its constitutional right to judicial review, procedural due process, substantive due process, and equal protection.

We find there has been no impairment of Appellant's right to judicial review under Article 1, Section 22 of the South Carolina Constitution, nor has there been a

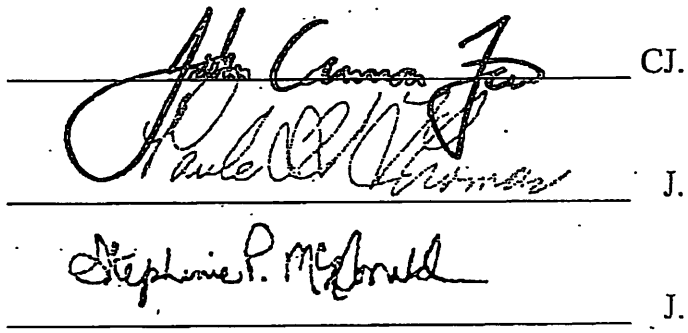
violation of its right to procedural due process. *See* S. C. Const. art. I, 22 (providing "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review"); *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) ("The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review."). Appellant has successfully initiated its appeal of the ALC's decision, and this court will soon give Appellant its judicial review. Appellant has never claimed it was unable to afford the appeal bond or that the appeal bond otherwise deterred it from filing its appeal. Further, because Appellant will receive its judicial review, we decline to find that the legislature's decision to impose the appeal bond violated the separation of powers doctrine by attempting to curtail judicial review and make the ALC, an executive branch agency, the final arbiter in CON cases.

Second, we find Appellant has not demonstrated an equal protection or substantive due process violation because there is a rational basis for the statute's provision awarding a respondent the appeal bond if the ALC's decision is upheld, and this provision is related to a legitimate government interest. *See Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 480, 636 S.E.2d 598, 613 (2006) ("To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis."); *id.* at 483, 636 S.E.2d at 614 ("[T]he standard for reviewing all substantive due process challenges to state statutes . . . is whether the statute bears a reasonable relationship to any legitimate interest of government."). As we read the statute, the legislature imposed the appeal bond on CON appellants to reserve some funds to compensate a respondent harmed by the delay of its approved project during the pendency of the appeal. We believe that is a legitimate government purpose.

We acknowledge that in some instances, adherence to the statute as written may produce imperfect results; however, we do not believe this invalidates the statute. *See Bodman v. State*, 403 S.C. 60, 70, 742 S.E.2d 363, 368 (2013) (stating that in the equal protection analysis, "[t]he classification also does not need to completely achieve its purpose to withstand constitutional scrutiny" nor does "[t]he fact that the classification may result in some inequity" make the classification unconstitutional (internal quotation marks omitted)). For example, if Grand Strand chose not to delay its project during the appeal and we affirm the ALC's decision,

Grand Strand may be entitled to receive the appeal bond without having suffered any delay costs. In that event, depending on how and whether this court awards costs and attorney's fees, the award of the appeal bond to Grand Strand could constitute a windfall. On the other hand, if we impose a stay or if Grand Strand chooses to delay its project during the appeal process and we affirm the ALC's decision, the award of the appeal bond may not fully compensate Grand Strand, resulting in a shortfall. In that case, the appeal would have harmed Grand Strand's economic interests. The statute may be understood to balance these two potential outcomes within the larger statutory framework of the CON Act, which seeks to efficiently regulate the construction of health facilities. *See* S.C. Code Ann. § 44-7-120 (2002) (stating two of the purposes of the CON Act are to "guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State"). Accordingly, we believe section 44-7-220(B) is constitutional as written, and it is not necessary to grant Appellant a stay to render the statute valid.

Therefore, for these reasons noted above, we deny Appellant's petition for supersedeas.



CJ.

J.

J.

Columbia, South Carolina.

FILED

March 19, 2015 JAK

cc: William R. Thomas, Esquire
Walter Hammond Cartin, Esquire
Ashley Caroline Biggers, Esquire
Vito Michael Wicevic, Esquire
Amber B. Carter, Esquire

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center, Petitioner, vs. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill, Respondents.	Docket No.: 11-ALJ-07-0575-CC **ORDER DENYING RESPONDENT'S MOTION TO STAY/SUPERSEDEAS PENDING APPEAL**

This matter is before the court on the Respondent's, The Charlotte Mecklenburg Hospital Authority d/b/a Carolina Medical Center-Fort Mill (Respondent or CHS), Motion to Stay/Supersedeas Pending Appeal and Memorandum in Support filed on January 28, 2015. The Respondent seeks to stay the December 15, 2015 Amended Final Order of the South Carolina Administrative Law Court ("ALC" or "court") granting the contested Certificate of Need (CON) to Amisub of South Carolina, Inc., d/b/a Piedmont Healthcare System d/b/a Fort Mill Medical Center (Petitioner or Piedmont) pending the outcome of the appeal filed by the Respondent in the South Carolina Court of Appeals. The court issued an Order Granting Motion to Stay Pending Appeal on February 10, 2015. However, the court vacated that Order on February 12, 2015 when it became aware that responsive pleadings that had been submitted by the Petitioner, had been misrouted to another judge on the ALC and had not been considered when the court issued its February 10, 2015 Order. Having reviewed the Petitioner's Memorandum in Opposition to Respondent's Motion to Stay/Supersedeas Pending Appeal, as well as the Respondent's Reply Memorandum, the court denies the Respondent's Motion to Stay/Supersedeas Pending Appeal.

FILED
FEB 20 2015
SC ADMIN. LAW COURT

This CON contested case was initiated by the Petitioner on November 15, 2011. After a hearing on the merits, this court issued a Final Order dated March 31, 2014 (Final Order) which granted a CON to the Petitioner and denied a CON to the Respondent. The Respondent received written notice of the entry of the Final Order on March 31, 2014. On April 9, 2014, the Respondent timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, South Carolina Rules of Civil Procedure (SCRCP). On May 2, 2014, the court vacated the Final Order. On December 15, 2014, the court issued an Amended Final Order. The Respondent received written notice of the entry of the Amended Final Order on December 15, 2014 and filed a Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015. The Respondent subsequently filed a cash bond, pursuant to S.C. Code Ann. § 44-7-220(B), with the Clerk of the South Carolina Court of Appeals in the sum of One Million Five Hundred Thousand and no/100 Dollars ($1,500,000.00), which is the maximum amount payable by statute.

JURISDICTION

The ALC has jurisdiction to rule on the Respondent's Motion to Stay pursuant to Rule 241, South Carolina Appellate Court Rules (SCAPCR). Rule 241(d) provides:

> Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

Similarly, Rule 205, SCACR, provides:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Therefore, the ALC has jurisdiction to consider any motion for a stay/supersedeas after a Notice of Appeal is filed, and the Court of Appeals may only consider it after the ALC has ruled or under "extraordinary circumstances." Pursuant to S.C. Code Ann. § 1-23-380(2), the ALC may grant a stay requested by a party "upon appropriate terms." Pursuant to S.C. Code Ann. § 44-7-220(B), a party seeking a reversal of the ALC's decision to approve a CON application must deposit a bond with the Clerk of the Court of Appeals up to a maximum of $1,500,000.00. Here, the Respondent has deposited the required bond pursuant to § 44-7-220(B).

DISCUSSION

The Respondent argues that it this court should grant a stay as a result of posting the bond pursuant to S.C. Code Ann. §44-7-220(B) (Supp. 2012). Alternatively, the Respondent argues that an equitable stay should be granted pursuant to S.C. Code Ann. § 1-23-380(2) (Supp. 2013) regarding the ability of an agency or reviewing court to grant a stay pending appeal. The court will address each argument in turn.

S.C. Code Ann. § 44-7-220(B)

In its motion filed on January 28, 2015, the Respondent asserts that on January 14, 2015, it posted a cash bond with the Clerk of the South Carolina Court of Appeals in the amount of $1,500,000.00, which is the maximum amount payable pursuant to S.C. Code Ann. § 44-7-220(B). As acknowledged in the Respondent's motion, the statute is silent on whether the posting of a bond will be accompanied by a stay of the underlying judgment. The Respondent asks the court to adopt the rationale in Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946) and find that the posting of the bond justifies this court issuing a stay. However, the court finds this case unpersuasive. Furthermore, in a much more recent case, the South Carolina Court of Appeals addressed this exact issue and denied a party's request for a stay based on arguments similar to those proposed by the Respondent. In Grand Strand Regional Medical Center v. S.C. Department of Health and Environmental Control, App. Case No. 22014-000973 (S.C. Ct. App., Dec 16, 2014), the South Carolina Court of Appeals denied the petition for a stay of Carolina Regional Cancer Center (CRCC). In that case, two applicants (CRCC and Grand Strand Regional Medical Center) were seeking certificates of need to provide radiation therapy services in the Myrtle Beach area. The

Administrative Law Court ruled that the applications were not competing and approved both. CRCC appealed the decision to the Court of Appeals, posting a bond pursuant to S.C. Code Ann. §44-70220(B). CRCC then filed a petition for supersedeas to stay implementation of Grand Stand's radiation therapy project.

The Court of Appeals denied CRCC's petition. In its opinion, the Court of Appeals held:

> Appeals from administrative tribunals are exceptions to the automatic stay requirement of Rule 241(a) of the South Carolina Appellate Court Rules. Rule 241(b)(11), SCAR. However, a supersedeas may be ordered pursuant to Rule 241(c), SCAR. The rule provides that "[i]n determining whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCAR. We find there is no danger the court will lose jurisdiction or the issues on appeal become moot if Grand Strand is allowed to proceed with its project. See S.C. Ret. Sys. Inv. Comm'n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Grand Strand acknowledges it would have to cease operations at its facility if this court reverses the ALC's decision approving its CON. Therefore, whether Grand Strand proceeds with construction and operation of its facility will not moot the issues on appeal or strip this court of jurisdiction.

This court finds the holding in Grand Strand to be dispositive of this issue. The Court of Appeals will not lose jurisdiction of this matter irrespective of whether the Petitioner is permitted to begin construction of its facility. Furthermore, in its Motion in Opposition, the Petitioner acknowledges, as did Grand Strand, that it would have to cease operations at Fort Mill Medical Center if the Court of Appeals were to reverse this court's decision approving its CON.

Equitable Stay

In the alternative, the Respondent argues that this court should grant an equitable stay to the Respondent during the pendency of its appeal under S.C. Code Ann. § 1-23-380(2). Section 1-23-380(2) provides that "serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. . ." However, the ALC may, "upon appropriate terms," order a stay "upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.," Although the Respondent has not filed a petition under Rule 65, SCRCP, it argues that Rule 65 is incorporated into the Administrative Procedures Act (APA) by § 1-23-380(2) and that this court should issue a preliminary injunction to preserve the *status quo ante* and because

the Respondent (1) will suffer irreparable harm without such relief; (2) has a likelihood on the merits; and (3) there is no adequate remedy at law. Poynter Invs. V. Century Builders of Piedmont, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).

1. Irreparable Harm

The Respondent asserts that it will lose significant revenue in Northern York County if the Petitioner is permitted to begin constructing its hospital because it will take market share from the Respondent. The court disagrees.

First, the court disagrees with the Respondent's assertion that it would lose market share to the Petitioner if the Petitioner were to be permitted to build its hospital. This court's decision to award the CON to the Petitioner was in part based on its finding that the Petitioner was consistently losing market share to the Respondent because of the Respondent's practices that ensured that patients seen by physicians within the Respondent's CPN network who needed hospital services were being referred exclusively to the Respondent's network of hospitals located outside of York County, and not to the Petitioner's existing hospital located within the county. Permitting the Respondent to build a hospital in Northern York County would accelerate the Petitioner's loss of market share, erode its payor mix, and would put at risk the quality of medical care available to York County residents, especially in the area of tertiary services, as the Respondent would continue to refer patients needing tertiary care to its out of county hospital network, and not to the Petitioner's Rock Hill hospital.

Additionally, the court finds it curious that the Respondent is now asserting that it will lose market share to the Petitioner if it is permitted to build its hospital in Northern York County. During the trial in this matter, it was the Respondent's position that its proposed Northern York County hospital's function would primarily be to relieve the high patient volume at its other hospitals and accommodate existing patients that were currently receiving care at those other CHS facilities outside of the county. The Respondent's position was that building its proposed hospital in Northern York County would allow it to manage its existing York County patient base better. Therefore, this court fails to understand how permitting the Petitioner to build its hospital will have any effect on the Respondent's existing market share which is currently being cared for at the Respondent's other hospitals.

Furthermore, even if the Respondent could establish that the construction of the Petitioner's hospital would cause some immediate economic loss, it would not rise to the level of

irreparable harm. Pure economic loss is generally insufficient to satisfy the irreparable harm prong of the test for obtaining a stay where an adequate remedy is available at law. Professional Wiring Installers, Inc. v. Sims, 2008 WL 9840409 (S.C. App. 2008) (Unpublished), citing MailSource, LLC v. M.A. Bailey and Associates, 356 S.C. 363, 370, 588 S.E.2d 635, 639 (Ct. App. 2003). The only exception to this general rule is when the economic loss would cause a complete loss of the business. Peck v. Spartanburg Regional Healthcare Systems, 3678 S.C. 450-455, 626 S.E.2d 34, 37 (Ct. App. 2005); Levine v. Spartanburg Regional Services District, 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005); District of Columbia v. E. Trans-Waste of Maryland, Inc., 758 A.2d 1, 15 (D.C. 2000); Campbell Inns, Inc. v. Banholzer, Turnure and Company, 148 Vt. 1, 527 A.2d 1142, 1146 (1987). As was demonstrated at the hearing, the Respondent is a large hospital system with forty-two (42) hospitals and other healthcare facilities, as well as a significant physician network. The economic loss posed by the Petitioner's One Hundred (100) bed hospital in Northern York County cannot be said to threaten the existence of the Respondent's business, and therefore, cannot be said to pose irreparable harm to the Respondent.

Finally, any change in referral patterns that may occur because of the construction and operation of the Petitioner's hospital would revert to the Respondent if it is successful on appeal.

2. Likelihood of Success on the Merits

The court disagrees with the Respondent that it only needs to raise a fair question as to its likelihood of success on appeal. Both cases cited by the Respondent in support of its position, Transcontinental Gas Pipe Line Corporation v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969), and Williams v. Jones, 92 S.C. 342, 348, 75 S.E. 705, 710 (1912), involves preliminary injunctions issued by a court before the trial occurred. In those cases, the court held that simply a prima facie showing in the complaint was all that was required to establish the likelihood of success prong of the test for injunctive relief. The court finds the holdings in those cases to be inapplicable here, where this case was in litigation for years, was subjected to a fifteen day trial, and where the court issued a detailed Amended Final Order.

Furthermore, the court respectfully disagrees, for reasons set forth in its Amended Final Order, that the Respondent is likely to succeed in its appeal on any of the grounds set forth in its motion.

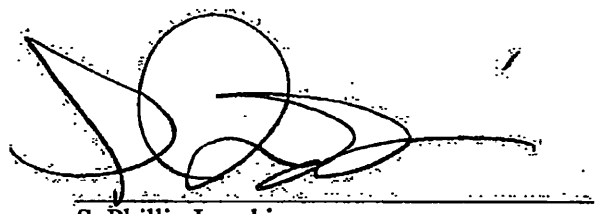
3. Adequate Remedy at Law

The last prong of the test for obtaining a stay requires the party to demonstrate that it has no adequate remedy at law. The Respondent's Motion to Stay/Supersedeas Pending Appeal fails to establish this. The Respondent's remedy at law is the appeal it has already filed. If it prevails, then the Petitioner will be required to stop the construction or the operation of its hospital.

ORDER

IT IS THEREFORE ORDERED that the Respondent's Motion to Stay/Supersedeas Pending Appeal is **DENIED.**

AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

February 20, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

February 20, 2015
Columbia, South Carolina

FILED
FEB 20 2015
SC ADMIN. LAW COURT

Transcript of the Testimony of
AMISUB OF SC V. SC DHEC

Date: April 8, 2013



CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index

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Columbia, SC 29201
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It is from the 2011 audited financial statements which includes results from 2011 and 2010.

Q: Okay. All right. And the very last line there is the end of year net assets, is that right? The last line item; end of year net assets?

A: Yes.

Q: Is that what that says?

A: Yes.

Q: It's hard for me to read it from here, and I can't read it on my monitor. And for 2011, the total reporting -- what does headline -- that heading on that column says total reporting entity; is that what it says?

A: I'm not sure which -- it's primary enterprise or are you looking above the primary enterprise?

Q: Well, let's start with 2011. At the top of the columns in bold face, each one of them says primary enterprise, the second one says combined component units. And what does the third one say?

A: Total reporting entity.

Q: Okay. For the total reporting entity column, what's the end of the year net assets? Can you

read that, please?
A: Not really. I think it's --
Q: Is it 3 billion and something.
A: It's -- yeah, it's 3 point, I think 5 billion.
Q: All right. And for the combined component units, what is it? Can you read that? Is it 800? I just can't see that.
A: I'm not sure what number you are looking at.
Q: I was looking at the combined component units end of the year net assets. So it's the very bottom of that column.
A: Oh, yeah, the middle column.
Q: Yeah, the middle column.
A: It looks like it's about $800 million.
Q: About $800 million?
A: Uh-huh (affirmative response).
Q: And for the primary enterprise, is that 2 point something?
A: Yes, $2.9 billion.
Q: $2.9 billion. Okay, thank you.
MR. WESTBROOK: Now, let's -- Dan, can I ask you to pull up, please, CHS-511. This is a -- I think you will recognize, Mr. Stewart, this is something from the CHS-Application. It says at the top "CMC-Fort Mill assumptions for

ATTACHMENT E

PROJECT TIMELINE (REVISED)

Piedmont Medical Center
Fort Mill Medical Center
Fort Mill Medical Center Proposal to Construct 100-Bed Hospital

Project Timeline

Phase	Anticipated Date (Month/Year)
Drawings submitted to City/State	April 2013
Agency Reviews Complete	June 2013
Construction Start	July 2013
Construction complete	May 2015
Occupancy	July 2015

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.5164
www.nelsonmullins.com

Daniel J. Westbrook
Tel: 803.255.9456
Fax: 803.255.5164
dan.westbrook@nelsonmullins.com

April 13, 2015

RECEIVED
APR 13 2015
SC Court of Appeals

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center vs. South Carolina Department of Health and Env. Control, et al
Appellate Case No. 2015-000056
Our File No. 05946/01509

Dear Ms. Kitchings:

I am enclosing an original and seven copies of **Return To Appellant's Supplemental Motion For Relief From Bond And Petition For Supersedeas** for filing. Please return a stamped copy to our office via our courier.

By copy of this letter, I am serving opposing counsel with these pleadings.

Very truly yours,

Daniel J. Westbrook

DJW:myb
Enclosures
cc: Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
Douglas M. Muller, Esq.
Trudy H. Robertson, Esq.
E. Brandon Gaskins, Esq.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
APR 13 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 2011-ALJ-07-0575-CC
Appellate Case No. 2015-000056

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RETURN TO APPELLANT'S MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS

Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas HealthCare System ("Carolinas") filed the above-captioned appeal challenging the final order of the Administrative Law Court ("ALC") on competing Certificate of Need ("CON") applications to construct a new hospital in York County. The ALC reversed the decision of Respondent South Carolina Department of Health and Environmental Control ("Department") and awarded the CON to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"), denying Carolinas' competing application. Upon the filing of its appeal, Carolinas posted a bond

with the Court of Appeals in the amount of $1,500,000, pursuant to the requirements of S.C. Code Ann. § 44-7-220(b).[1]

Carolinas filed a two-part motion with the Court of Appeals. First, Carolinas moves the Court of Appeals for relief from the bond, challenging the constitutionality of the bond on three grounds: (a) the separation of powers doctrine; (b) the equal protection clause; and (c) due process requirements. Second, Carolinas petitions the Court of Appeals to exercise its equitable power to stay the underlying action (grant of the CON to Piedmont) until the appeal process is resolved, arguing: (a) without such relief it will suffer irreparable harm; (b) it has a likelihood of success on the merits, and (c) there is no adequate remedy at law. The Department submits the below response to the three constitutional challenges to the bond provision raised in Carolinas' motion for relief from the stay. The Department takes no position with respect to Carolinas' petition for supersedeas to maintain the status quo pending resolution of the appeal.

SEPARATION OF POWERS

The South Carolina Constitution requires the legislative, executive, and judicial powers of state government "be forever separate and distinct from each other" and mandates "no person or persons exercising the functions of one of said department shall

[1] S.C. Code Ann. § 44-7-220(b) provides in pertinent part: "If the relief requested in the appeal is the reversal of the Administrative Law Court's decision to approve the Certificate of Need application ..., the party filing the appeal shall deposit a bond with the Clerk of the Court of Appeals within five calendar days after filing the petition to appeal. The bond must be secured by cash or a surety authorized to do business in this State in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. If the Court of Appeals affirms the Administrative Law Court's decision or dismisses the appeal, the Court of Appeals shall award to the party whose project is the subject of the appeal all of the bond and also may award reasonable attorney's fees and costs incurred in the appeal. If a party appeals the denial of its own Certificate of Need application ... and there is no competing application involved in the appeal, the party filing the appeal is not required to deposit a bond with the Court of Appeals."

assume or discharge the duties of any other." S.C. Const. art. I, § 8. Carolinas contends the bond provision violates the separation of powers and creates a statutory barrier to appeals of CON cases.

A panel of the Court of Appeals recently considered and rejected a similar argument in Grand Strand Regional Medical Center v. South Carolina Department of Health and Environmental Control, App. Case No. 2014-000973 (S.C.Ct. App. filed March 15, 2015). While not a final published opinion, the order in Grand Strand is directly relevant because, as in this case, the appellant raised separation of powers, equal protection, and due process arguments regarding the bond provision as a basis petitioning the Court of Appeals to stay the ALC's award of a CON to another entity pending the outcome of the appeal. In its order denying the petition for supersedeas, the Court of Appeals held "because Appellant will receive its judicial review, we decline to find that the legislature's decision to impose the appeal bond violated the separation of powers doctrine by attempting to curtail judicial review and make the ALC, an executive branch agency, the final arbiter in CON cases." Id. at p. 4.

Carolinas distinguishes its motion from Grand Strand's by focusing the issue on promulgation of rules of judicial practice and procedure. Carolinas cites Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992) as an example of the Court finding invalid a statute that limits the court's appellate scope of review. Carolinas cites Rutherford as standing for the proposition that "judiciary – not legislature – had authority to make rules for the court's practice and procedure." App.'s Supp. Brief, p. 6. However, the Court in Rutherford noted that "[t]he legislative authority to enact legislation governing the practice and procedure in the state courts simply cannot be read as an unlimited power contrary to

other constitutional limitations on that power." Id. at 204, 414 S.E.2d at 160 (Emphasis added). Impliedly, then, the legislature may enact legislation governing procedure in state courts, within constitutional limits. The statute at issue in Rutherford exceeded constitutional limits by portending to limit the Supreme Court's scope of review in domestic cases, in direct conflict with the jurisdiction granted to the Supreme Court in the South Carolina Constitution. Id. at 203-04, 414 S.E2d at 159-60. While the bond provision imposes an additional requirement on CON appellants not found in Court rules, it does not curtail the appellate courts' authority to provide judicial review. There is no constitutional violation with respect to separation of powers.

EQUAL PROTECTION

The constitutions of the United States and of South Carolina guarantee that no person shall be denied equal protection of the laws. U.S. Const.. Amend. XIV, 1; S.C. Const. art. I, 3. "To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis." Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 480-81, 636 S.E.2d 598, 613 (2006). As the party asserting an equal protection challenge, Carolinas bears the burden of showing that the bond provision does not meet this test. Samson v. Greenville Hosp. Sys., 295 S.C. 359, 367, 368 S.E.2d 665, 669 (1988). "When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." Gold v. S.C. Bd. of Chiropractic Examiners, 271 S.C. 74, 78, 245 S.E.2d 117, 119–20 (1978). A

"legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distribs. and Amusement Co. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999).

"A crucial step in the analysis of any equal protection issue is the identification of the pertinent class, *i.e.*, exactly who is included in the group of persons allegedly being treated differently under similar circumstances without any rational basis." Sloan at 481, 636 S.E.2d at 613. Carolinas alleges the group of persons being treated differently consists of those persons who may wish to appeal a final order of the ALC granting a CON to another person. Unlike appellants challenging final orders of the ALC in other types of cases, appellants in Carolinas' class must deposit a bond with the Court of Appeals secured by cash or surety in an amount equal to five percent of the total cost of the project being appealed, or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars. See S.C. Code Ann. § 44-7-220(b).

The Legislature identified the purposes of the Certificate of Need laws in statute: to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State. S.C. Code Ann. § 44-7-120. The Legislature also identified a potential purpose in requiring the posting of a bond by appellants challenging another person's grant of a CON. In the event the Court of Appeals determines the appeal to have been frivolous, it may award damages incurred as a result of the delay, as well as reasonable attorney's fees and costs, to the party whose CON project was the subject of the appeal. S.C. Code Ann. § 44-7-220(c)(1).

The bond is automatically awarded to the CON applicant if the person challenging the CON approval loses their appeal. S.C. Code Ann. § 44-7-220(b). It is reasonable to conclude that the purposes for requiring the bond are to compensate the CON applicant for any costs incurred in the delay of implementing their project due to an unsuccessful legal challenge to the project, and to discourage frivolous appeals of needed healthcare projects. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 429, 593 S.E.2d 462, 469 (2004) ("A legislative enactment will be sustained against constitutional attack if there is any reasonable hypothesis to support it."); see also Foster v. S. Carolina Dep't of Highways & Pub. Transp., 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992) ("The classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge."). The Court of Appeals agreed in Grand Strand, holding "[a]s we read the statute, the legislature imposed the appeal bond on CON appellants to reserve some funds to compensate a respondent harmed by the delay of its approved project during the pendency of the appeal." Grand Strand, App. Case No. 2014-000973, p. 4 (S.C.Ct. App. filed March 15, 2015). "We believe that is a legitimate government purpose." Id. Thus, the bond provision is constitutional.

DUE PROCESS

The South Carolina Constitution provides that "no person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due noticeand an opportunity to be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const. art. I, § 22. "The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the

opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review." Sloan at 484-85, 636 S.E.2d at 615.

Carolinas was party to a contested case hearing at the ALC, following adequate notice, where it introduced evidence and cross-examined witnesses. Carolinas then filed its appeal this appeal of the ALC's final order and posted the bond required by S.C. Code Ann. § 44-7-220(b). Should Carolinas prevail in its appeal, the bond will be returned to it. If Carolinas loses its appeal, Section 44-7-220(b) provides that the bond will be awarded to Piedmont. Either way, Carolinas will receive judicial review. Carolinas has failed to present any evidence that it has been denied procedural due process. See also Grand Strand, App. Case No. 2014-000973, pp. 3-4 (S.C.Ct. App. filed March 15, 2015) (finding no procedural due process violation with the bond requirement, citing the facts that: the appellant had successfully initiated its appeal of the ALC's decision; the Court of Appeals would soon give appellant judicial its judicial review; and the appellant had never claimed it was unable to afford the appeal bond or that the appeal bond otherwise deterred it from filing its appeal).

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Court of Appeals deny Carolinas' motion for relief from the bond. The Department takes no position on Carolinas' petition for a stay of the ALC's final order pending the appeals process.

[Signature on following page]

Respectfully submitted,

Ashley C. Biggers, Esquire (SC Bar No.: 17225)
Vito M. Wicevic, Esquire (SC Bar No.: 100265)
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367

April 13, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 2011-ALJ-07-0575-CC
Appellate Case No. 2015-000056

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

PROOF OF SERVICE

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **13th day of April, 2015**, served a copy of ***RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL'S RETURN TO APPELLANT'S MOTION FOR RELIEF FROM BOND AND PETITION FOR SUPERSEDEAS*** upon all parties and counsel of record in the above-captioned case, via Electronic Mail and United States Mail, First Class, postage prepaid, addressed as follows:

Parties of Record

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211
Email: dan.westbrook@nelsonmullins.com
Email: stuart.andrews@nelsonmullins.com

Attorneys for Amisub of SC, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
P.O. Box 22828
Charleston, SC 29413
Email: dougmuller@mvalaw.com
Email: trudyrobertson@mvalaw.com
Email: brandongaskins@mvalaw.com

Attorneys for The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center --Fort Mill

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

By: Jaimie Presley Jones
Jaimie Presley Jones

Date: April 13th, 2015

D H E C
PROMOTE PROTECT PROSPER
W. Marshall Taylor Jr., Acting Director
Promoting and protecting the health of the public and the environment.

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SC Court of Appeals

April 13, 2015

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center v. South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill
Appellant No. : 2015-000056
OGC# 21301.1

Dear Ms. Kitchings:

Enclosed for filing with your office are the originals and seven (7) copies of the following:

1. ***Respondent South Carolina Department of Health and Environmental Control's Return to Appellant's Motion for Relief from Bond and Petition for Supersedeas***
2. ***Proof of Service***

Please return a clocked copy to the courier. By copy of this letter to all parties of record, I am enclosing the above for service.

Thank you for your assistance.

Very truly yours,

Jaimie Presley Jones
Office of General Counsel

cc: Daniel J. Westbrook, Esquire
Stuart M. Andrews, Esquire
Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

FINAL BRIEF OF APPELLANT

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

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STATEMENT OF ISSUES ON APPEAL

I. Did the Administrative Law Court's application of the Certificate of Need Act, State Health Plan, and Project Review Criteria violate the dormant Commerce Clause by awarding the certificate of need (a) to protect an existing hospital from competition from a non-local hospital system; (b) to reduce the amount of South Carolina patients seeking healthcare in North Carolina and other areas outside of York County; and (c) based on an in-state hospital's exclusive ability to transfer beds?

II. Did the Administrative Law Court erroneously approve Piedmont's proposal to transfer hospital beds without reviewing whether Piedmont's proposal complied with the regulatory criteria established under the State Health Plan's Bed Transfer Provision, and thereby improperly decide certain Project Review Criteria in favor of Piedmont in reliance on Piedmont's ability to transfer hospital beds?

III. Did the Administrative Law Court erroneously, arbitrarily, or capriciously apply the Certificate of Need Act, State Health Plan, and Project Review Criteria when it awarded a certificate of need by (a) failing to conduct a balanced and complete review of the applicable regulatory criteria; (b) relying on irrelevant and impertinent information to decide certain criteria; and (c) making arbitrary and irrational conclusions that contradict the plain language and statutory and regulatory purposes of the Certificate of Need Act, State Health Plan, and Project Review Criteria?

STATEMENT OF THE CASE

This case began approximately ten years ago, in March 2005, when Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas"), Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ("Piedmont"), and a third applicant[1], Presbyterian Healthcare ("Presbyterian"), filed certificate of need ("CON") applications with the South Carolina Department of Health and Environmental Control ("DHEC") pursuant to the 2004-2005 State Health Plan ("2004-2005 Plan" or "State Health Plan") (R. pp. 3045-3215) to construct and operate a general acute care hospital in Fort Mill, York County, South Carolina ("Fort Mill CON"). (R. p. 75). Carolinas, a North Carolina-based hospital system[2], proposed to construct and operate Carolinas Medical Center-Fort Mill ("CMC-FM"), a 64-bed general acute care hospital, consistent with the bed need recognized in the 2004-2005 Plan. (*Id.*) Piedmont initially proposed a 64-bed hospital but later amended its application by seeking to transfer 36 beds from its existing hospital in Rock Hill, Piedmont Medical Center, to its proposed new facility, the Fort Mill Medical Center ("FMMC"), and thereby construct and operate a 100-bed hospital. (R. pp. 75-76). Piedmont's hospital in Rock Hill is the sole hospital in York County. (R. p. 3069).

On May 30, 2006, DHEC denied the Fort Mill CON applications of Carolinas and Presbyterian and issued the CON to Piedmont. (R. p. 76). At the time, Piedmont argued and DHEC agreed that only an existing hospital in a county was entitled to apply for a

[1] A fourth applicant, Hospital Partners of America ("HPA"), also applied for a 64-bed hospital but HPA did not file a contested case when its application was denied.

[2] Carolinas is a non-profit healthcare system operating in both North Carolina and South Carolina. (R. p. 1320, line 25-p. 1321, line 13). Piedmont is a wholly-owned subsidiary of Tenet Healthcare, Inc. ("Tenet"). (R. p. 361, lines 5-16). Tenet is a for-profit, publicly traded company which owns and operates forty-nine (49) hospitals across the United States. (R. p. 345, lines 18-23, p. 361, lines 5-9).

CON to build a new hospital in the county ("Matthews Order"). (R. pp. 1-28). On June 12, 2006, Carolinas and Presbyterian timely requested a contested case (the "First Contested Case") to challenge DHEC's decision with the South Carolina Administrative Law Court ("ALC").

In September 2009, Judge Matthews presided over a three week hearing in the First Contested Case. After Carolinas and Presbyterian concluded their cases, Judge Matthews granted their Motions for Summary Judgment on the grounds that DHEC had erroneously adopted Piedmont's legal argument that only Piedmont, as the existing hospital in York County, was eligible to apply for a new hospital in York County. (R. p. 10). As a result, Judge Matthews remanded the Fort Mill CON applications to DHEC for further review consistent with her instructions to determine "which of the applications, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by [DHEC]." (R. p. 27).

Piedmont appealed Judge Matthews's Order to the South Carolina Supreme Court, and Carolinas and Presbyterian cross-appealed. In a decision dated April 8, 2010, the South Carolina Supreme Court dismissed the appeal and remanded to DHEC because Judge Matthews's Order was not a "final decision" immediately appealable under S.C. Code Ann. § 1-23-610, which limits appellate review to final decisions of the ALC.[3] (R. pp. 29-33).

After DHEC regained jurisdiction over the Fort Mill CON matter, it reviewed the updated CON applications submitted on October 4, 2010 by Carolinas, Presbyterian, and

[3] The consolidated appeals went first to the South Carolina Court of Appeals, which referred them for disposition to the South Carolina Supreme Court.

Piedmont under the CON Act (S.C. Code Ann. § 44-7-160, *et seq.*), the 2004-2005 Plan, and the applicable Project Review Criteria[4] (S.C. Regs. 61-15 § 802.1, *et seq.*).[5] (R. p. 77). DHEC established the relative importance of the Criteria, listing the most important Criteria first, as follows:

Rank 1	Compliance with the State Plan (Criterion 1)
Rank 2	Community Need Documentation (Criteria 2a-2e) Distribution (Accessibility) (Criteria 3a-3g) Distribution (Criterion 22)
Rank 3	Projected Revenues (Criteria 6a-6b) Projected Expenses (Criterion 7) Net Income (Criterion 9) Financial Feasibility (Criterion 15) Cost Containment (Criteria 16a-16c) Efficiency (Criterion 17)
Rank 4	Record of the Applicant (Criteria 13a, 13b, 13d) Acceptability (Criteria 4a-4c) Adverse Effects on Other Facilities (Criteria 23a-23b)

(R. p. 81).

On September 9, 2011, eleven (11) months after the initial submissions by the parties, DHEC awarded the CON to Carolinas and denied a CON to Piedmont and Presbyterian. (R. pp. 2173-2185, 3030-3044). By the time DHEC made its decision on September 9, 2011, DHEC's staff had reviewed extensive material related to the CON applications gathered over more than six years. DHEC's findings supported the following conclusions: (1) Carolinas most fully complies with the Project Review Criteria; (2) Carolinas best justified the implementation of its project because of its

[4] The Project Review Criteria are sometimes referred to collectively as the "Criteria," and its singular components are sometimes referred to as the "Criterion."

[5] By consent of all the parties, the ALC established October 4, 2010 as the deadline for the applicants to submit to DHEC any supplemental information. On that date, Carolinas, Piedmont, and Presbyterian submitted extensive supplemental information to DHEC to update their previous applications.

current significant level of market share and utilization in Northern York County; (3) Carolinas' project is financially feasible; and (4) Carolinas' project would increase accessibility and availability of services by shifting its current market share to a facility in South Carolina, resulting in less adverse impact to existing facilities. (*Id.*)

On November 15, 2011, Presbyterian and Piedmont requested a contested case with the ALC to review DHEC's award of the CON to Carolinas (the "Second Contested Case").[6] The Second Contested Case was assigned to Judge S. Phillip Lenski and progressed through a hearing on the merits conducted over fifteen days in March and April 2013. Approximately a year after the hearing, the ALC issued a Final Order dated March 31, 2014 reversing DHEC's decision, issuing the CON to Piedmont instead, and denying the CON to Carolinas (the "Final Order"). (R. pp. 34-72). On April 9, 2014, Carolinas timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, SCRCP ("Motion to Reconsider"). (R. pp. 227-249). On May 2, 2014, the ALC vacated the Final Order. (R. p. 73). Over seven months later, on December 15, 2014, the ALC issued the Amended Final Order, maintaining its previous ruling reversing DHEC's decision, granting the CON to Piedmont, and denying the CON to Carolinas. (R. pp. 125-126).

In the Amended Final Order, the ALC expressly stated that its purpose and rationale for awarding the CON to Piedmont was to protect Piedmont from perceived adverse effects of competition from an out-of-state hospital and to reduce the number of South Carolinians who voluntarily seek healthcare from Carolinas at its North Carolina hospitals. (R. pp. 121-122, 124-125). The Amended Final Order contains numerous

[6] Presbyterian subsequently withdrew from the Second Contested Case.

findings that awarding the CON to Carolinas will adversely affect Piedmont's profits, utilization, quality of service, types of services, payor mix, and physician staff. (R. pp. 86-99, 118-120, 124-125). The ALC's Amended Final Order also favored the existing medical provider in York County, Piedmont, to the detriment of the out-of-state provider, Carolinas, by concluding that Piedmont's 100-bed facility would better meet future bed need for the area than Carolinas' 64-bed facility. (R. pp. 100-105, 113, 118-119, 123-124).

Overall, the ALC's Amended Final Order significantly departs from the conclusions reached by DHEC as to which applicant better meets the Project Review Criteria. In its post-remand decision, DHEC found that Carolinas either better meets or equally meets all Criteria and that Piedmont did not better meet any Criteria. In contrast, the ALC concluded that Carolinas better meets no Criteria and that Piedmont either better or equally meets all Criteria. As demonstrated by the below chart, the ALC reversed DHEC's findings that Carolinas either better meets or equally meets eighteen Criteria:[7]

Rank	Description	DHEC	Court
Rank 1	Compliance with the State Health Plan	Equal	Equal
Rank 2			
2a	Community Need Documentation	Equal	Piedmont
2b	Population projections	Equal	Piedmont
2c	Service to meet need	Equal	Piedmont
2d	Reduction, elimination or relocation of service	[8]	Piedmont
2e	Current or projected utilization justified	Carolinas	Piedmont

[7] This chart is derived from the Amended Final Order and DHEC's Fort Mill CON decision letter and Project Review Criteria Analysis. (R. pp. 74-126, 2173-2185).

[8] Criterion 2d applies to Piedmont only because only Piedmont proposes to relocate beds to its proposed facility. Although DHEC made no specific finding about whether Piedmont satisfied Criterion 2d, it stated that it "was concerned with this criterion being adequately demonstrated" because of its concerns that Piedmont's "high level of projected market share is not reasonable." (R. p. 2178).

3a	Duplication and modernization	[9]	Equal
3b	Located to serve medically undeserved	Equal	Equal
3c	Location allows for timely delivery of support services	Equal	Equal
3d	No restriction on admissions	Equal	Piedmont
3e	Documentation of access means	Equal	Equal
3f	Access to medically underserved	Carolinas	Piedmont
3g	Provisions for access regardless of ability to pay	Carolinas	Equal
22	Distribution	Carolinas	Piedmont

Rank 3			
6a	Charges	Equal	Equal
6b	Projected Utilization/Expenses	Carolinas	Equal
7	Consistent with Similar Facilities	Equal	Equal
9	Net Income	Carolinas	Equal
15	Financial Feasibility	Carolinas	Equal
16a	Cost Containment	Carolinas	Equal
16b	Lease Alternatives	Equal	Equal
16c	Impact on Costs	Equal	Piedmont
17	Efficiency	Carolinas	Piedmont

Rank 4			
13a	Record of the Applicant	Equal	Equal
13b	Ability to Obtain Financing	Carolinas	Equal[10]
13d	Record of Compliance	Equal	Equal
4a	Acceptability	Equal	Equal
4b	Opposition	Equal	Equal
4c	Possible Transfer Agreements	Equal	Equal
23a	Adverse Impact on Existing Facilities	Carolinas	Piedmont
23b	Adverse Impact on Staffing	Equal	Equal

Carolinas received written notice of the entry of the Amended Final Order on December 15, 2014, and filed its Notice of Appeal with the South Carolina Court of Appeals on January 14, 2015.

[9] Like Criterion 2d, Criterion 3a applies to Piedmont only. DHEC found that Piedmont did "not adequately justify the duplication of services by the transfer of 36 existing beds in a project with a total project cost of either $119,808,964, or $146,522,042 which includes financing cost during construction." (R. p. 2181).

[10] The ALC made no specific findings of fact or conclusions of law in addressing Criterion 13b. Rather, the ALC determined that both applicants equally meet this Criterion because the parties do not dispute "DHEC's finding that Piedmont and CHS equally meet" Criterion 13b. (R. p. 117). As indicated by DHEC's conclusion that Carolinas better meets Criterion 13b (R. p. 2183), though, DHEC made no such finding that Criterion 13b is equally met, and the parties dispute which applicant better meets Criterion 13b.

ARGUMENT

Standard of Review

On appeal from a final decision of the ALC in a CON contested case, the Court of Appeals "may reverse or modify the decision if the substantive rights of the [appellant] have been prejudiced because the finding, conclusion, or decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; . . . (d) affected by other error of law; . . . or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-610(B).

I. THE ALC'S APPLICATION OF THE CON ACT, 2004-2005 PLAN, AND PROJECT REVIEW CRITERIA VIOLATES THE DORMANT COMMERCE CLAUSE.

A. The dormant Commerce Clause prohibits state and local laws and regulations that discriminate against or impermissibly burden interstate commerce.

The Commerce Clause of the United States Constitution grants Congress the power to regulate interstate commerce. *U.S. Const. art. I, § 8, cl. 3.* The Commerce Clause "also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst., Inc.*, 492 U.S. 324, 326 n.1 (1986). "The negative or dormant Commerce Clause 'prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 789 (4th Cir. 1991) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)). Thus, the dormant Commerce Clause invalidates state or local "laws that impose commercial barriers or discriminate

against an article of commerce by reason of its origin or destination." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). The principle behind the dormant Commerce Clause is that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

As the United States Supreme Court's jurisprudence has evolved, a two-tier analytical framework has been established for determining whether a state or local law or regulation is invalid under the dormant Commerce Clause: (1) a discrimination tier, and (2) an undue burden tier. *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005). Under the first tier, a court must consider whether the law or regulation discriminates against interstate commerce by providing "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013). "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the [state or] municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392.

A law or regulation may discriminate "facially, in its practical effect, or in its purpose." *Colon Health Ctrs.*, 733 F.3d at 543. Accordingly, "merely noting a law's facial neutrality is insufficient" in analyzing whether a law or regulation discriminates against interstate commerce. *Id.* "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Id.* Thus, a facially neutral law may discriminate against

interstate commerce in violation of the dormant Commerce Clause if it is applied to effectively protect or is intended to protect existing in-state interests from out-of-state competition. *Walgreen Co. v. Rullan*, 405 F.3d 50, 57 (1st Cir. 2005).

Even if a law is not discriminatory under the first tier, it may nevertheless violate the dormant Commerce Clause if it unduly burdens interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under the *Pike* framework, "[w]here a statute regulates even-handedly to effectuate a legitimate local purpose, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. Unlike the more exacting standard employed under the discrimination tier, the undue burden tier applies a "less strict scrutiny":

> The putative benefits of a challenged law are evaluated under the rational basis test, though "speculative" benefits will not pass muster. The *Pike* test requires closer examination, however, when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests. The test is therefore deferential but not toothless.

Colon Health Ctrs., 733 F.3d at 545 (internal citations omitted). If the law imposes a burden on interstate commerce, the court must then engage in a balancing approach to resolve whether the local interest "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

B. State and local certificate of need and licensing laws and regulations are invalid under the dormant Commerce Clause if they have the effect and purpose of protecting local economic interests against competition from non-local economic interests.

Beginning in the early twentieth century, courts began invalidating under the dormant Commerce Clause state and local certificate of need and licensing laws and regulations that protect existing local or in-state interests against competition from non-

local or out-of-state interests. *See, e.g., Buck v. Kuykendall*, 267 U.S. 307, 316 (1925) (invalidating certificate of need aimed at prohibiting competition because its "effect upon [interstate] commerce is not merely to burden it but to obstruct it"). Later, in *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), the Supreme Court invalidated a New York law that provided that a license to operate a milk receiving depot could not be granted by the New York Commissioner of Agriculture and Markets "unless the commissioner is satisfied that . . . the issuance of the license will not tend to a destructive competition in a market already served, and that the issuance of the license is in the public interest." *Id.* at 527 n. 3 (quoting N.Y. Agric. Mkts. Law § 258-c). In that case, H.P. Hood, a Massachusetts corporation which sold milk in Massachusetts and already maintained three milk receiving depots in New York, applied for a license for a fourth depot. The commissioner denied the application on the grounds that the new depot would "tend to a destructive competition in a market already adequately served." *Id.* at 529. Hood sued, and the United States Supreme Court ruled that the New York statute, as applied, violated the dormant Commerce Clause by discriminating against interstate commerce. According to the Supreme Court, the Commissioner's objective of preventing Hood from taking business from local businesses was impermissible because it was based "upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end . . . always held to be precluded by the Commerce Clause." *Id.* at 542. In so holding, the Supreme Court declared that a "state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *Id.* at 538.

In *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), a case that has striking similarities to the present case, the First Circuit Court of Appeals invalidated Puerto Rico's certificate of need scheme as applied to pharmacies. Puerto Rico's certificate of need statute prohibited a person from acquiring or constructing a health facility, including a pharmacy, without having first obtained a certificate of necessity and convenience. Under the statute, a proposed new pharmacy was required to submit a certificate request. *Id.* at 53. If an affected person objected to the issuance of the certificate, the case was assigned to an administrative hearing where the parties presented, *inter alia*, expert testimony regarding the expected impact of the proposed pharmacy on competition in the local area. *Id.* At the conclusion of the hearing, the Secretary of the Health Department made a final determination based on his review of various statutory criteria. *Id.* The criteria included whether the proposed pharmacy would be located in an area that was already "saturated" by existing pharmacies. *Id.* at 54.

Walgreen brought suit claiming that Puerto Rico's certificate of need act, as applied to retail pharmacies, was invalid because it discriminated against interstate commerce or excessively burdened interstate commerce. While recognizing that the act was facially neutral because it applied to both in-state and out-of-state interests wishing to open a pharmacy, the First Circuit nevertheless found the statute invalid under the dormant Commerce Clause because it allowed the Secretary to "block a new pharmacy from locating in its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies." *Id.* at 55.

Citing the Supreme Court opinions in *Buck* and *H.P. Hood & Sons*, the *Walgreen* court observed that dormant Commerce Clause jurisprudence established that laws could

be invalidated if they "gave in-state interests the ability to manipulate a facially neutral regulatory scheme to establish advantages over out-of-state interests" or if they "permit a state to deny an operating license on the basis that the opening of a new facility in a particular location will cause undue competition for existing facilities." *Id.* at 56-57. The court held that Puerto Rico's certificate of need act suffered from both infirmities:

> It permits the Secretary to deny a proposed pharmacy market access at its desired location simply to limit competition. Further, the Secretary invokes this authority only upon the urging of a member of the largely local group of existing pharmacies, thereby permitting a predominantly local group to manipulate the regulatory scheme for its own advantage. For these reasons, the Act discriminates against commerce by permitting established pharmacies 'to retard, burden or constrict the flow of . . . commerce for their own economic advantage.'

Id. at 57. Thus, the court resolved the dormant Commerce Clause challenge by concluding that the certificate of need law was discriminatory in practice and purpose without reaching the second tier *Pike* balancing test.

More recently, the Fifth Circuit Court of Appeals held that the application of a permitting ordinance was unconstitutional under the dormant Commerce Clause because it protected existing permit holders from competition in *Fla. Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (5th Cir. 2012). Although that case involved a stevedoring permitting ordinance, the ordinance operated similarly to the CON program involved in this case because it conditioned an applicant's ability to operate its business at a certain location on meeting certain criteria, including need, financial strength, and competency. *Id.* at 1236. In that case, the "needs" criteria was applied to deny new applicants permits because the duplication of services sought by the applicants could lead to destructive competition and cause economic hardship to the existing operators. *Id.* at 1239. The court ruled that the application of the ordinance in this fashion unconstitutionally

burdened interstate commerce under the *Pike* test because it protected and insulated existing businesses from any new competition. *Id.* at 1258-1262; *see also Medigen, Inc. v. Public Serv. Comm'n*, 985 F.2d 164 (4th Cir. 1993) (invalidating certificate of convenience and necessity law for transporters of infectious medical waste under the *Pike* balancing test because the law limited competition).

C. The ALC's application of the CON Act, State Health Plan, and Project Review Criteria violates the dormant Commerce Clause because it is intended to and will protect Piedmont against competition from an out-of-state competitor, reduce the amount of South Carolina patients seeking healthcare from out-of-state providers, and provides in-state hospitals with an advantage over out-of-state hospitals in obtaining a CON.

In awarding the CON to Piedmont, the ALC applied the CON Act, the 2004-2005 Plan, and Project Review Criteria to effectuate the illegitimate purpose of protecting Piedmont's existing hospital against competition from its out-of-state rival, Carolinas. The ALC's decision discriminates - in both purpose and effect - against an out-of-state competitor in favor of the existing local hospital. As such, the ALC applied the applicable regulations and criteria in violation of the dormant Commerce Clause.

The ALC did not mask its discriminatory intent to deny the CON to Carolinas because of its out-of-state status. Instead, the ALC made clear that the unifying purpose of its decision was to protect Piedmont from competition and to stop York County residents from receiving hospital care in North Carolina – primarily from Carolinas, which has established itself as the preferred healthcare provider in Northern York County. (R. pp. 121-122, 124-125). In so doing, the ALC substituted its judgment for those of the resident healthcare consumers by restricting Carolina's access to the York County hospital market. The dormant Commerce Clause, however, forbids this type of economic protectionism.

1. Adverse Impact

The ALC's most blatant application of the Project Review Criteria in a constitutionally impermissible manner is found in its legal conclusions regarding "adverse impact." Piedmont made adverse impact the central focus of its case, presenting dozens of hours of witness testimony on direct and cross-examination and hundreds of demonstrative and trial exhibits regarding the potential impact CMC-FM would have on Piedmont.[11] The ALC recognized this dynamic in the Final Amended Order, stating that the "most heavily disputed application of the Project Review Criteria relates to DHEC's analysis of . . . adverse impact." (R. p. 120).

Although DHEC ranked adverse impact among the least important criteria for its review, the ALC devoted a substantial number of its factual findings and legal conclusions to addressing CMC-FM's potential impact on Piedmont. (R. pp. 86-99, 118-122, 124-125). The ALC's adverse impact analysis, though, was one-sided and only assessed whether CMC-FM would have an adverse impact on Piedmont without conducting the same analysis of whether FMMC would adversely impact Carolinas – despite the fact that Carolinas' hospitals in North Carolina have obtained a majority market share in Northern York County.[12] Thus, the ALC applied the "adverse impact"

[11] The opening statement of Piedmont's counsel illustrates aptly how insulation from competition from a North Carolina hospital provider was Piedmont's primary goal in seeking the reversal of DHEC's decision. In concluding his opening statement, Piedmont's counsel stated, "For years, [Carolinas] has been taking patients, paying patients out of the Fort Mill area over into North Carolina and providing them, steering them for hospital services. The presence of CMC-Fort Mill will only escalate that process. The only way to halt the out-migration and to give Piedmont the ability, the opportunity to provide high-quality services to all of York County is to allow it to build the Fort Mill Medical Center. Thank you (R. p. 296, lines 1-11).

[12] The 2009 inpatient market share for community hospital services in Northern York County was divided primarily among three providers: Carolinas at 52.9%, Piedmont at 28.7%, and Presbyterian at 16.8% - in total accounting for 98.4% of the inpatient discharges in Northern York County for community hospital services. (R. pp. 2132-2133).

criteria in a discriminatory manner that only considered CMC-FM's effects on the existing local hospital without looking at FMMC's potential impact on out-of-state and out-of-county hospitals, such as Carolinas.

The ALC's one-sided analysis of "adverse impact" is both discriminatory in effect and purpose because it is inherently biased in favor of the existing local hospital and against non-local competitors. This bias becomes even more pronounced when the ALC's legal conclusions are analyzed on a Criterion-by-Criterion basis. As demonstrated below, the ALC conclusions for each "adverse impact" Criterion for which it found Piedmont better meets were motivated by a unifying – but constitutionally impermissible – purpose: to protect Piedmont from non-local competition and to reduce the number of South Carolinians seeking healthcare in North Carolina.

a. Project Review Criterion 16c – S.C. Regs. 61-15 § 802.16(c)

Although DHEC Regulations provide that Criterion 16c is intended to evaluate cost containment, the ALC incorrectly included Criterion 16c in the "adverse impact" Criteria. Criterion 16c assesses the "impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of other providers of similar services should be considered if the data are available." S.C. Regs. 61-15 § 802.16(c). The ALC found that Piedmont better meets Criterion 16c:

> The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated per unit cost per unit of services associated would increase. As a result, the operation of CMC-FM would have an adverse effect on existing providers. For that reason, Piedmont best meets § 802.16(c).

(R. p. 121). The ALC gave no other rationale for determining that Piedmont better meets Criterion 16c beyond CMC-FM's purported adverse effect on Piedmont's costs.

The ALC's application of Criterion 16(c) violates the dormant Commerce Clause because its intent and effect is to protect the local hospital's profitability from being harmed by a new market entrant. By basing its conclusion on the finding that the operation of CMC-FM will make it more difficult for Piedmont to recoup its fixed costs, the ALC essentially determined that Piedmont better meets Criterion 16c because CMC-FM will make Piedmont less profitable. The dormant Commerce Clause prohibits the ALC from applying the CON regulatory scheme to protect local interests from declining profitability based on competition from a non-local competitor. *See Carbone*, 511 U.S. at 393 (ruling that municipal ordinance requiring that waste be processed in a town-sponsored waste facility violated dormant Commerce Clause because its central purpose was to ensure the facility's profitability); *Walgreen*, 405 F.3d at 58 (invalidating certificate of need scheme that resulted in protection of "mostly local group of existing pharmacies from competitive pressure"); *Medigen*, 985 F.2d at 167 (declaring invalid a certificate of need regulation intended to protect existing local businesses).

b. Project Review Criterion 22 – S.C. Regs. 61-15 § 802.22

Criterion 22 provides that the "existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population." S.C. Regs. 61-15 § 802.22. The ALC reversed DHEC's decision that Carolinas better meets Criterion 22 and concluded that Piedmont better meets it because "the operation of CMC-FM would have an adverse effect on the distribution of services provided by

existing healthcare providers to the residents of York County." (R. p. 121). The ALC based this conclusion on the testimony of three physicians on Piedmont's medical staff and letters from approximately 40 other physicians in York County that utilized Piedmont Medical Center. (*Id.*)

Although the ALC's legal conclusion that Piedmont better meets Criterion 22 references CMC-FM's speculative adverse effects on physicians on Piedmont's medical staff, the findings of fact demonstrate that the ALC's primary concern was the extent to which changes in the physician market arising from the establishment of CMC-FM market would affect Piedmont. According to these findings, the ALC speculated that CMC-FM could force physicians on Piedmont's hospital staff to become employed by Carolinas' affiliated physician network, CPN[13], or seek staff privileges at CMC-FM and, consequently, reduce the amount of patient referrals they make to Piedmont. (R. pp. 88-89, 96-97, 98-99). Thus, the ALC decided Criterion 22 in Piedmont's favor because increased competition from CMC-FM would negatively impact Piedmont's ability to retain its staff physicians and receive their referrals. In other words, the ALC decided this Criterion on the basis that competition from CMC-FM would hinder Piedmont's ability to maintain its physician relationships and referral base, and ultimately its utilization and profitability. Again, applying the regulations for the purpose and intended effect of protecting an existing local hospital from competition from a non-local hospital violates the dormant Commerce Clause.

[13] "CPN" is an abbreviation of Carolinas Physicians Network.

c. Project Review Criterion 23a – S.C. Regs. 61-15 § 802.23(a)

Criterion 23a provides that the "impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." S.C. Regs. 61-15 § 802.23. In reversing DHEC's conclusion that Carolinas better meets Criterion 23a, the ALC ruled that Carolinas did not meet this Criterion and that Piedmont did meet it. (R. pp. 121-122). In so ruling, the ALC focused solely on the negative financial impact resulting to Piedmont from competition from CMC-FM:

> [T]he court finds Piedmont has proven, by a preponderance of the evidence, that [Carolinas] would continue to acquire market share from Piedmont if CMC-FM were established. This would be accomplished through services provided by CMC-FM, as well as by the increased outmigration of patients to [Carolinas] facilities outside of York County for more specialized services. . . . Under the incremental approach [for assessing adverse impact], Piedmont would lose from one thousand six hundred (1,600) to three thousand (3,000) inpatients per year. When the loss of outpatients is projected, the total annual lost income caused by the operation of CMC-FM would range from $12,000,000 to $22,000,000, depending upon which expert's analysis is considered.

(R. pp. 121-122). Thus, the ALC's ruling on Criterion 23a favored Piedmont based on the determination that Piedmont's income would be adversely affected by competition from an out-of-state provider operating a hospital in York County.

As a result, the ALC engaged in constitutionally impermissible economic protectionism in applying Criterion 23a. The sole purpose and practical effect of the ALC's ruling in this regard was to protect Piedmont's market share from competition. In *H.P. Hood & Sons*, the United States Supreme Court declared that states cannot regulate with the primary purpose of prohibiting competition. 336 U.S. at 538. Relying on *H.P. Hood & Sons*, courts have routinely invalidated regulatory schemes and practices that

protect local interests by prohibiting non-local interests from entering the market. *See, e.g., Walgreen*, 405 F.3d at 57 (ruling that certificate of need regulations violated the dormant Commerce Clause because it denied "a proposed pharmacy market access at its desired location simply to limit competition"). These cases demonstrate that the ALC's application of Criterion 23a, as well as the other "adverse impact" Criteria, are discriminatory and violate the dormant Commerce Clause.

2. *Need - Project Review Criteria 2a, 2b, 2c, and 2e - S.C. Regs. 61-15 § 802.2(a)-(c), (e)*

The ALC determined that Piedmont better meets Criteria 2a, 2b, 2c, and 2e, which the ALC referred to as the "need" Criteria, and reversed DHEC's determination that the applicants equally meet Criteria 2a, 2b, and 2c and that Carolinas better meets Criteria 2e. The ALC summarily decided that Piedmont better meets the "need" Criteria because Piedmont's hospital is intended to reduce the outmigration of patients from York County to North Carolina and other surrounding areas:

> In addition to meeting the need for new hospital services, Piedmont's application was specifically intended to strengthen the York County healthcare system by reducing outmigration from York County. While patients have sought medical services outside of York County for years, primarily in the Charlotte area, the outmigration accelerated from 2005 to 2011. The effects of outmigration . . . reduced the ability of Piedmont and many of the independent physicians on Piedmont's medical staff to meet the healthcare needs of York County residents. Piedmont demonstrated by a preponderance of the evidence that the establishment of FMMC would strengthen the capacity of existing York County providers to meet those needs.

(R. p. 118). Thus, the ALC concluded that Piedmont better meets the "need" Criteria because FMMC would curb the flow of patients travelling to North Carolina for healthcare.[14]

In applying Criteria 2a, 2b, 2c, and 2e to reduce the amount of patients seeking healthcare in North Carolina and other non-local markets, the ALC purposely sought to interfere with interstate commerce in the healthcare industry. The dormant Commerce Clause prohibits the application of regulations that discriminate and burden interstate commerce in such manner. Although the ALC obviously believes that York County residents should obtain healthcare in York County for the benefit of Piedmont and other healthcare providers, denying a license to construct a facility engaged in interstate commerce on the "grounds that [the new facility] will subject others to competition and take supplies needed locally" is an end "always held to be precluded by the Commerce Clause." *H.P. Hood & Sons*, 336 U.S. at 542; *see also, Carbone*, 511 U.S. at 393 ("States and localities may not attach restrictions to exports or imports in order to control commerce in other States."). But that is exactly what the ALC did by applying the "need" Criteria to curb outmigration. In effect, the ALC seeks to reduce the amount of South Carolina residents receiving healthcare in North Carolina by preventing Carolinas from importing its hospital services to Northern York County and referring, or exporting, its patients to other facilities in North Carolina.

[14] The ALC's improper focus on preventing outmigration from York County disregards that the 2004-2005 Plan specifically contemplates that a health service area may cross over state boundaries for the purpose of accessibility. The 2004-2005 Plan provides: "Any service area may cross multiple administrative, geographic, trade and/or political boundaries. It is recognized that due to factors which may include availability, accessibility, personal or physician preferences, insurance and managed care contracts or coverage, or other reimbursement issues, patients may seek and receive treatment outside the county or inventory region in which they reside and/or outside of the state. Therefore, service areas may specifically cross inventory regions and/or state boundaries." (R. p. 3057). The reality is that many York County residents seek healthcare from Carolinas and other providers in the Charlotte metropolitan area.

In addition to *H.P. Hood & Sons,* the United States Supreme Court's opinion in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Resources*, 504 U.S. 353 (1992), illustrates the unconstitutionality of the ALC's application of the "need" criteria under the dormant Commerce Clause. That case involved a Michigan statute that allowed a county to only accept waste generated in that county and restricted the import of solid waste from both in-state and out-of-state. *Id.* at 361. The Court invalidated the statute because the waste restrictions were discriminatory under the dormant Commerce Clause and afforded "local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas." *Id.*

Like the waste restrictions involved in *Fort Gratiot*, the ALC's application of the "need" Criteria seeks to limit out-of-state and out-of-county interests from accessing the local market. In *Fort Gratiot*, the relevant market was local waste disposal areas; whereas, in this case, the market is local healthcare services. Therefore, the ALC violated the dormant Commerce Clause by attempting to reduce the amount of York County patients obtaining healthcare in North Carolina and other non-local markets. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (invalidating under the dormant Commerce Clause a local ordinance that "erect[ed] an economic barrier protecting a major local industry against competition without the State").

In addition to finding that Piedmont better meets the "need" Criteria because of CMC'-FM's and FMMC's speculative effect on outmigration, the ALC concluded that Piedmont better meets them because FMMC's 100-bed hospital could better handle the demand for hospital services in Northern York County than CMC-FM's 64-bed hospital.

(R. p. 118). According to the ALC, Carolinas' "proposed facility would be too small to fully meet the demand" for hospital services in Northern York County. (*Id.*)

The ALC's application of the "need" Criteria to reach this conclusion may appear non-discriminatory on its face, but a close examination of how the CON regulations permit only an existing hospital to transfer beds to a proposed new facility demonstrates that the "need" Criteria, as applied by the ALC, discriminate against out-of-state hospital systems and favor existing local hospitals.

Although the 2004-2005 Plan recognized a need for only an additional 64 beds, Piedmont proposed a 100-bed hospital because it could transfer unused beds at its existing hospital in York County to FMMC under DHEC's Bed Transfer Provision in the State Health Plan. Carolinas, however, could not transfer beds from its hospitals in North Carolina under DHEC's Bed Transfer Provision. (R. p. 909, line 20-p. 911, line 22; pp. 3063-3064). Unlike Piedmont, Carolinas was limited to proposing a 64-bed hospital consistent with the need recognized in the 2004-2005 Plan.

By providing Piedmont with an advantage over its out-of-state competitor, Carolinas, based on Piedmont's exclusive ability to propose a hospital with more beds, the ALC applied the "need" Criteria in a manner that unconstitutionally discriminates against out-of-state hospital systems. Carolinas, as an out-of-state hospital system without the ability to transfer beds, started from a point of disadvantage under the ALC's application of the Criteria. And the discriminatory application of such Criteria was only exacerbated by the ALC punishing Carolinas for being the preferred hospital provider in Northern York County as a result of its conclusion that the "need" for a Carolinas hospital in Northern York County was too substantial to accommodate with a 64-bed

hospital. Thus, the ALC impermissibly precluded Carolinas from better meeting the "need" Criteria by applying the Criteria so that only an existing in-state hospital with the ability to transfer empty beds could meet them. *See Walgreen*, 405 F.3d at 57 (finding CON statute in violation of dormant Commerce Clause because it permitted "a predominantly local group to manipulate the regulatory scheme for its own advantage").

3. Financial Feasibility – Project Review Criterion 17 – S.C. Regs. 61-15 § 802.17

Criterion 17 provides that the "proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size." S.C. Regs. 61-15 § 802.17. The ALC reversed DHEC's finding that Carolinas better meets Criterion 17 by concluding that Piedmont better satisfied the Criterion because Piedmont's "proposal fosters economies of scale by spreading costs over a greater number of beds" and because its proposed 100-bed hospital could better accommodate future growth. (R. p. 123). Therefore, the ALC again applied the Criteria to give Piedmont an advantage unavailable to an out-of-state competitor, such as Carolinas, by relying on Piedmont's ability to transfer unused beds to FMMC. As discussed above, the ALC's application of the Criteria in a manner that permits the existing local hospital to exploit a regulatory provision that discriminatorily applies to only in-state hospitals violates the dormant Commerce Clause.

D. <u>The ALC erred by failing to conduct the proper dormant Commerce Clause analysis.</u>

The ALC erred in rejecting Carolinas' argument that its application of the Criteria violated the dormant Commerce Clause by failing to conduct any analysis under the applicable legal standard. In fact, the ALC rejected Carolinas' dormant Commerce Clause argument with a mere footnote:

> [T]he court does not believe it violated the Dormant Commerce Clause in its analysis and application of the State Health Plan or Project Review Criterion in the original or amended decision. The same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers. . . . Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because [Carolinas] disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

(R. p. 75). The ALC did not engage in any analysis of the dormant Commerce Clause issues beyond this footnote.

Rather than conduct the analysis under well-established dormant Commerce Clause precedent, the ALC erroneously ruled that no constitutional violation can arise from its application of the Criteria because it would have applied them equally to in-state and out-of-state applicants. In connection with this ruling, the ALC deleted specific references about outmigration of York County residents to North Carolina in the Amended Final Order. For example, in the Final Order, the ALC stated, "This court concludes that the establishment of the FMMC will best serve the public needs by reducing the outmigration of York County residents to **North Carolina** hospitals." (R. p. 71) (emphasis added). In the Amended Final Order, the ALC revised the paragraph by deleting "North Carolina hospitals" and inserting "hospitals **beyond York County**." (R. p. 124) (emphasis added). The ALC's revision, however, did not correct the constitutional problem with its analysis. Rather, the ALC ignored long-standing law that unequivocally establishes that a discriminatory regulatory scheme is no less unconstitutional because it discriminates against in-state interests as well as out-of-state

interests. This principle is firmly entrenched in dormant Commerce Clause jurisprudence.

The United States Supreme Court established this principle over a century ago in *Brimmer v. Rebmen*, 138 U.S. 78 (1891), in which it concluded that a Virginia statute, which imposed special inspection fees from animals slaughtered over 100 miles from the place of sale, violated the dormant Commerce Clause. The Court explained:

> This statute cannot be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all states, including Virginia; for a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.

Id. at 82-83 (internal quotations omitted).

The Supreme Court reaffirmed this principle several decades later in *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). In that case, the Supreme Court invalidated on dormant Commerce Clause grounds a city ordinance that required all milk sold in Madison, Wisconsin, to be pasteurized, processed, and bottled at a city-approved plant within five miles of Madison. *Id.* at 350. The Court concluded that the ordinance discriminated against interstate commerce because it "erect[ed] an economic barrier protecting a major local industry against competition from without the State." *Id.* at 354. In declaring the ordinance unconstitutional, the Court rejected the argument that the ordinance was not discriminatory because it applied to in-state milk distributors as well as out-of-state distributors. According to the Court, it was "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n. 4. *See also Fort Gratiot*, 504 U.S. at 361-62 (relying on *Brimmer* and *Dean Milk* to hold that waste disposal ordinance violated

dormant Commerce Clause despite its equal treatment of out-of-state and in-state waste); *Carbone*, 511 U.S. at 391 (ruling that waste "ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition"); *Walgreen,* 405 F.3d at 58 (invaliding discriminatory certificate of need program that applied equally to all newcomers to protect existing pharmacies in the local markets, regardless of whether the newcomers were from in-state or out-of-state); *Fla. Transp. Servs.*, 703 F.3d at 1258-59 (finding a dormant Commerce Clause violation when permitting decision affected in-state Florida corporation that operated in a neighboring county). Therefore, the controlling factor under the dormant Commerce Clause analysis is not whether the challenged law or regulation applies equally to in-state and out-of-state interests but whether it protects local interests against competition from non-local interests.

These cases illustrate the clear error in the ALC's rejection of Carolinas' dormant Commerce Clause argument. Even if the ALC's statement that the "same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers" is true, it is irrelevant to whether the ALC applied the Criteria in a constitutionally impermissible manner. The ALC's application of the Criteria in the same or similar manner to an in-state competitor would have the purpose and practical effect of protecting Piedmont against competition from non-local applicants. Under the precedent outlined above, the ALC's application of the Criteria to erect barriers of entry into the York County hospital market for the purpose and effect of protecting a local hospital from competition is unconstitutional under the dormant Commerce Clause – regardless of whether the competing applicant was from Columbia

or Charlotte. As a result, the ALC's defense of its analysis is flawed and cannot save the clearly unconstitutional purpose and effect of the ALC's application of the Criteria.

II. THE ALC ERRONEOUSLY APPROVED PIEDMONT'S PROPOSAL TO TRANSFER BEDS TO CREATE A 100-BED HOSPITAL.

Because it operates the only existing hospital in York County, Piedmont seeks to utilize the Bed Transfer Provision in the 2004-2005 Plan to enhance its application by transferring 36 beds from Piedmont Medical Center to FMMC, making its proposed hospital in Fort Mill a 100-bed hospital. (R. p. 906, line 19–p. 908, line 18; p. 909, line 20-p. 911, line 22)). Carolinas has consistently argued that Piedmont's proposal to transfer beds is not justified under the 2004-2005 Plan and Criteria based on Piedmont's declining utilization at its existing hospital and inferior market share in Northern York County. (R. p. 1556, line 10-p. 1584, line 19; p. 1808, line 3-p.1815, line 24; p. 1816, line 3-p. 1844, line 18; pp. 2134-2171). In its second review, DHEC ultimately agreed with Carolinas' position, finding that Piedmont's hospital does not better meet several Criteria because Piedmont failed to demonstrate that it could recapture enough market share to sufficiently utilize its proposed 100-bed hospital. (R. pp. 2173-2185). The ALC subsequently reversed DHEC's decision in the Second Contested Case and determined that several Criteria – Criteria 2a, 2b, 2c, 2e, 3a, 6b, and 17 – should be decided in Piedmont's favor, in part, because of Piedmont's exclusive ability as the incumbent, in-county hospital to transfer beds to construct a larger hospital. (R. pp. 117, 118, 123).

In addition to the fundamental flaw of favoring the existing hospital because it is the only applicant able to transfer beds to construct a larger hospital, the ALC erred in approving the transfer of beds from Piedmont to FMMC because it failed to make any findings of fact or conclusions of law that Piedmont meets the mandatory criteria

required to transfer beds under DHEC's Bed Transfer Provision in the 2004-2005 Plan. Under the Bed Transfer Provision, a proposal to transfer beds "**must comply**" with eight established criteria. (R. p. 3063) (emphasis added); *see also Trident Medical Ctr. v. S.C. Dep't of Health and Envt'l Control*, Opinion No. 5297, 2015 S.C. App. LEXIS 18, *22-23 (Ct. App. Feb. 18, 2015 (stating that the "Bed Transfer Provision consists of a list of eight criteria with which a CON applicant **must comply**") (emphasis added). The ALC's decision is devoid of any consideration of the criteria under the Bed Transfer Provision.

By awarding Piedmont a CON to establish a 100-bed hospital, which includes 36 beds to be transferred to FMMC, without making any findings or conclusions regarding the criteria under the Bed Transfer Provision, the ALC exceeded its authority under the CON Act and 2004-2005 Plan. Moreover, by basing its conclusions that Piedmont better meets Criteria 2a, 2b, 2c, 2e, 3a, 6b, and 17 on its ability to construct a 100-bed hospital, the ALC impermissibly assumed that Piedmont could transfer beds without conducting the required analysis under the Bed Transfer Provision. Therefore, the ALC's conclusions as to these Criteria and its award of a CON for a 100-bed hospital are infected with legal error and should be vacated. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 520-22, 560 S.E.2d 410, 417-18 (2001) (reversing and remanding decision where ALC failed to conduct consistency review required under applicable law and failed to make any factual findings relating to such review).

III. THE ALC ERRONEOUSLY, ARBITRARILY, AND CAPRICIOUSLY APPLIED THE CON ACT, STATE HEALTH PLAN, AND PROJECT REVIEW CRITERIA.

The ALC's Amended Final Order contains multiple errors of law that caused the ALC to conclude that Piedmont better meets several Project Review Criteria. In applying the Criteria, the ALC relied on mistaken interpretations of the applicable Criteria or

disregarded their plain language. The ALC's conclusions conflict with DHEC's interpretation and application of the same Criteria and reveal an arbitrary and capricious reasoning process that cannot be reconciled with the purposes of the CON Act and its implementing regulations.

In resolving the conflict between DHEC's and the ALC's findings and conclusions, the Court should "defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration . . . 'unless there is a compelling reason to differ.'" *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 766 S.E.2d 707, 718 (2014) (quoting *S.C. Coastal Conservation League v. S.C. Dep't of Health Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). Where, as here, the ALC's and the agency's interpretation of a statute or regulation differs, the Court should defer to the agency's interpretation rather than the ALC's interpretation. *Id.* at 718-19 (ruling under administrative agency deference doctrine that DHEC had reasonably interpreted environmental statute and regulations and refusing to defer to ALC's different interpretation and application of the same statute and regulations).

A. The ALC erroneously applied the "adverse impact" criteria by failing to balance adverse impact against increased accessibility and disregarding the proposed projects' impact on the functional balance of healthcare distribution.

In awarding the CON to Piedmont, the ALC exceeded its authority under the CON Act and applicable regulatory criteria with the intent to protect the existing hospital in York County and keep a competitor out of the market because it effectively repeated the erroneous decision that DHEC made initially when it awarded the CON to Piedmont prior to the First Contested Case.

In the First Contested Case, Judge Matthews found that the two DHEC reviewers, Joel Grice and Mary Fechtel, exceeded their statutory authority by erroneously determining that only Piedmont could qualify for a CON under the State Health Plan because it was the only existing hospital in York County. Specifically, Judge Matthews found that:

> In this case, the record is replete with evidence that there is no uniformity among the Department witnesses in terms of their interpretation of the Plan. While both Mr. Grice and Ms. Fechtel ultimately testified they believed it was clear that only Piedmont Medical Center (and, in turn, FMMC) complies with the Plan's Bed Need under Regulation 61-15 § 802.1, it took them well over a year to arrive at that conclusion. . . . Ms. Fechtel's testimony makes it clear that the Department never conducted a true comparative analysis and did not make its determination 'on the basis of which, if any, most fully complies with the requirements, goals, and purposes of this article and the State Health Plan, Project Review Criteria, and the regulations adopted by the department' as required by the CON Act. See S.C. Code Ann. § 44-7-210(C) (Rev. 2002). Under the circumstances, I find that the Department committed an error of law and exceeded its statutory authority when it construed this ambiguous Plan so that only the existing hospital could comply with the Plan Bed Need.

(R. pp. 22, 24).

Although the ALC nominally adopted Judge Matthew's prior ruling in the Second Contested Case. (R. p. 125), the ALC minimized the comprehensive review of all applications conducted by a new reviewer, Beverly Brandt of DHEC, and effectively determined that only Piedmont could be awarded the CON based on the ALC's application of the adverse impact criteria and Piedmont's ability to transfer beds. In so doing, the ALC relied on the same two employees of DHEC who conducted the erroneous first review - Joel Grice and Mary Fechtel. After complimenting Ms. Brandt for her "thorough" review on remand in the Final Order, the ALC stated that it relied on the "testimony" of the two former DHEC employees who were <u>not</u> involved in DHEC's

second review. (R. p. 70). In fact, Ms. Fechtel did not even testify in the Second Contested Case, and Mr. Grice, who had retired from DHEC, was testifying as a paid consultant and expert for Piedmont. Judge Lenski stated in the Final Order:

> DHEC conducted a thorough review process for the applications. DHEC staff asked numerous questions of both applicants seeking additional information and held a project review meeting to thoroughly discuss and understand the proposed projects. The Project Review Criteria Analysis was thorough and detailed. This court finds that the Department properly reviewed and analyzed both applications. To the extent that the court disagrees with aspects of Ms. Brandt's analysis, **it was persuaded by the testimony of Mr. Grice and Ms. Fechtel, both of whom worked within the CON program for many years and possessed greater experience and institutional knowledge**.

(R. p. 70) (emphasis added).

Carolinas noted in its Motion to Reconsider that Ms. Fechtel was not involved in the second review and did not testify during the Second Contested Case (R. p. 236), and the ALC later removed the reference to its reliance on Ms. Fechtel's testimony in the Amended Final Order (R. p. 124). After the ALC deleted the reference to "Ms. Fechtel" in the Amended Final Order, that left the persuasion to Mr. Grice, the architect of the prior, failed interpretation in DHEC's first review and now a paid expert for Piedmont. Even then, the ALC's rulings on the Criteria only match a small portion of Mr. Grice's opinions. In his testimony, Mr. Grice frequently agreed with Ms. Brandt and found that Carolinas and Piedmont equally meet many of the Criteria, while the ALC concluded that Piedmont better meets the same Criteria. (R. pp. 237-238).

If there is consistency to the ALC's ruling and Mr. Grice's opinions, it relates to what Piedmont labeled the "adverse impact" Criteria, Criteria 22 and 23(a), of which

both the ALC and Mr. Grice found that Piedmont better meets.[15] The error in the ALC's analysis is that it improperly placed too much weight and importance on "adverse impact" while ignoring the increased accessibility offered by CMC-FM, through which Carolinas intended to serve its existing patient base and predominant market share in Northern York County with a closer hospital.

The ALC's ruling is inconsistent with the CON Act, 2004-2005 Plan, and Criteria. The CON Act provides specifically that:

> With the advice of the health planning committee, the department shall prepare a South Carolina Health Plan for use in the administration of the Certificate of Need program provided in this article. The plan at a minimum must include: . . . (4) a general statement as to the project review criteria considered most important in evaluating Certificate of Need applications for each type of facility, service, and equipment, **including a finding as to whether the benefits of improved accessibility to each such type of facility, service, and equipment may outweigh the adverse affects caused by the duplication of any existing facility, service, or equipment**.

S.C. Code Ann. § 44-7-180(B)(4) (emphasis added). The 2004-2005 Plan includes a similar statement in the hospital section that "the benefits of improved accessibility will be equally weighted with the adverse affects of duplication in evaluating Certificate of Need applications for these beds." (R. p. 3064). Criterion 23(a) similarly provides: "The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services." S.C. Regs. 61-15§ 802.23(a).

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[15] The ALC's reliance on Mr. Grice's testimony is significant under the dormant Commerce Clause. Mr. Grice testified that when he was the CON administrator he was instructed by legislators to "try to protect and assist South Carolina-licensed hospitals. And that is our main focus, not to make some decision that's going to negatively impact them." (R. p. 1061, line 15-p. 1062, line 12). The ALC stated that it was persuaded by Mr. Grice's "institutional knowledge and history with DHEC's CON program," and its express purpose of awarding the CON to Piedmont to protect Piedmont from competition from a North Carolina hospital reveals the extent to which the ALC adopted Mr. Grice's approach.

Collectively, these statutory and regulatory requirements make clear that the "adverse effects of duplication" alone are insufficient to justify denying a CON to a new hospital, particularly one that will offer substantially increased accessibility to its existing patients. Despite the regulatory requirement to conduct a balancing analysis, the ALC failed to weigh the increased accessibility that Carolinas' patients would achieve from CMC-FM against CMC-FM's purported adverse impact on Piedmont. In fact, the ALC's ruling reflects that it was solely focused on adverse impact. For example, in addressing review criteria 23(a), the court concluded: "Although CMC-FM will undoubtedly serve [Carolinas'] patients, the court finds Piedmont has proven, by a preponderance of the evidence, that [Carolinas] would continue to acquire market share from Piedmont if CMC-FM were established." (R. p. 121). These conclusions focus on adverse impact and do not adequately address the increased accessibility that CMC-FM would offer to residents in Northern York County, where it has a majority market share.[16]

Similarly, in addressing Criterion 22, which promotes the functional balance of healthcare distribution, the ALC concluded that "the operation of CMC-FM would have an adverse effect on the distribution of services provided by existing healthcare providers to the residents of York County." (R. p. 121). By focusing on adverse impact rather than functional distribution between the competing applicants, the ALC ignored Piedmont's majority market share in the rest of York County. When considered with Carolinas' majority market share in Northern York County, these facts demonstrate that the existence of a Carolinas hospital in Fort Mill and Piedmont's existing hospital in Rock Hill would establish a "functional balance" of distribution under Criterion 22.

[16]As noted previously, in 2009 Carolinas had a 52.9% inpatient market share in Northern York County, almost double that of Piedmont at 28.7%. (R. pp. 2132-2133).

The ALC's analysis of Criterion 23a and 22 contrasts sharply with DHEC's determination that increased accessibility resulting from CMC-FM outweighs the adverse impact that CMC-FM would have on Piedmont and would enhance the balance of distribution of healthcare. According to DHEC, "Carolinas best meets Project Review Criterion 23a as it currently has a high level of market share in Northern York County and already serves a significant percentage of York County residents. Carolinas has almost as much market share of York County as a whole as Piedmont."[17] (R. p. 2184) In addressing Criterion 23a, DHEC also recounted the alleged adverse impact that Piedmont claimed would result from the construction of a new hospital by a North Carolina provider in Fort Mill. (*Id.*) Nevertheless, DHEC found that any adverse impact would be outweighed by the increased accessibility to hospital services achieved by Carolinas' patients from the establishment of CMC-FM. (*Id.*)

Similarly, DHEC found that Carolinas better meets Criterion 22 because Carolinas is the only applicant that proposes to successfully shift its current market share and because of concerns about whether FMMC could balance the distribution of healthcare to the target population. (R. p. 2182). According to DHEC, it is doubtful that Piedmont could recapture patients to the extent it proposes and because it "is not clear that the number of beds proposed to be constructed are fully justified given the target population includes patients who would have to drive past Piedmont to reach FMMC." (*Id.*)

[17] While the ALC failed to make any express findings regarding the increased accessibility resulting from the establishment of CMC-FM, the ALC's findings demonstrate that it is beyond dispute that Carolinas' hospital in Fort Mill would significantly increase accessibility to hospital services for its patients in York County. This conclusion is implicit in the ALC's findings that CMC-FM would be well-utilized and that Carolinas' York County discharges increased by a total of one thousand eight hundred (1,800) patients from 2005 to 2010. (R. pp. 85, 101).

The stark distinction between DHEC's and the ALC's analysis of Criteria 22 and 23a reveals that DHEC correctly applied these Criteria by addressing how the proposed projects would impact the functional balance of the distribution of healthcare and by conducting the required balancing of increased accessibility and adverse impact. The ALC, however, neglected these regulatory requirements. Therefore, the ALC's application of Criteria 22 and 23a is legally flawed because it focuses solely on adverse impact. Accordingly, the ALC's conclusions conflict with the CON Act's, 2004-2005 Plan's, and Criteria's requirement that adverse impact be weighed against increased accessibility, and the Court should vacate DHEC's conclusion as to this criterion. *See Kiawah Dev. Partners,* 766 S.E.2d at 720-22 (reversing ALC's decision in contested case because it erred in interpreting permitting regulation in a way that avoided statutory intent of balancing of economic and environmental considerations).

Although there are relatively few cases that address similar situations, one such case is a Florida appellate court decision, *Dep't of Health & Rehabilitative Services v. Johnson & Johnson Home Health Care*, 447 So. 2d 361 (Fla. Dist. Ct. App. 1st Dist. 1984). In *Johnson & Johnson*, the court considered the legality of an administrative agency rule that prohibited a new home health agency from receiving a CON unless it was seeing an average of 300 patients a day. The stated purpose of the "rule of 300" was to halt the proliferation of new home health businesses and to protect the existing, licensed businesses from competition. *Id.* at 362-63.

In finding that this rule exceeded the agency's statutory authority, the *Johnson & Johnson* court found:

> The stated purpose of the rule was to halt the proliferation of home health agencies. The record before the hearing officer showed that the rule of 300

> was designed to protect the existing industry from competition. There is no reasonable relationship shown between the prohibition of the rule and the health, morals, safety or welfare of the public. The rule is arbitrary and capricious and cannot stand. . . .The hearing officer correctly concluded that the rule of 300 precluded a balanced consideration of all the statutory criteria. The rule allows HRS to ignore some statutory criteria and emphasize others, contrary to the legislative purpose it is supposed to implement. The rule exceeds delegated legislative authority.

Id. (internal citations omitted). Other courts have similarly found that an administrative review that applies unbalanced criteria in a manner that is inconsistent with the state certificate of need act is invalid as a matter of law. *See, e.g., Fairmont Gen. Hosp. v. W. Va. Health Care Auth.*, 218 W. Va. 360, 368-69, 624 S.E.2d 797, 805-806 (2005) (administrative agency's invocation of five-mile geographic limitation and its failure to balance statutory criteria was in violation of certificate of need law).

In sum, the ALC erroneously applied the CON Act, 2004-2005 Plan, and Criteria by making adverse impact the primary basis of its decision without weighing such impact against increased accessibility or properly analyzing the competing projects' impact on the functional balance of healthcare distribution. As a result, the Court should vacate the ALC's conclusions regarding adverse impact and reinstate DHEC's decision.

B. <u>The ALC erroneously, arbitrarily, and capriciously applied the "need" Criteria by relying on irrelevant findings.</u>

The ALC erred in applying Criteria 2a, 2b, 2c, and 2e by conflating their individual standards and concluding that Piedmont better meets them based on findings that are irrelevant to the ultimate determinations that must be made for each specific Criterion. The ALC failed to individually analyze each "need" Criterion and concluded that Piedmont better meets them collectively based on two factors: (1) Piedmont's 100-bed hospital would better meet the need of the growing population of Northern York

County than would Carolinas' proposed 64-bed hospital, and (2) the establishment of FMMC would strengthen the capacity of existing York County healthcare providers to meet the healthcare needs of York County residents. (R. p. 118). As discussed below, these findings are irrelevant to the determination of which applicant better meets the respective "need" Criteria.

Criterion 2a provides that the "target population should be clearly identified as to the size, location, distribution, and socioeconomic status (if applicable)," and Criterion 2b requires that "[p]rojections of anticipated population changes should be reasonable based upon accepted demographic or statistical methodologies." S.C. Regs. 61-15 § 802.2(a)-(b). The ALC erroneously determined that Piedmont better meets these Criteria because it did not base its conclusion on the applicants' identification of the target population or the reasonableness of their projections in anticipated population changes. Rather, it based its ruling on Criteria 2a and 2b on the size of FMMC and the finding that FMMC will strengthen the capacity of existing York County healthcare providers, both of which are immaterial. Clearly, these factors have no bearing on which applicant better identifies the target population or reasonably projected population changes, and the ALC erred in relying on them to award Criteria 2a and 2b in favor of Piedmont.[18] *See Sierra Club v. S.C. Dep't of Health & Envtl. Control*, Opinion No. 5253, 2014 S.C. App. LEXIS 201, *28-30, *42-47 (Ct. App. July 30, 20014) (ruling that ALC erred in finding compliance

[18] The ALC's failure to apply Criteria 2a and 2b according to their own language is further evidenced by the fact that Piedmont's and Carolinas' respective expert witnesses unanimously agreed with DHEC that both applicants equally meet these Criteria. While the ALC may reach its own conclusions regarding which applicant better meets the respective criteria, the fact that it disregarded the undisputed conclusions presented by DHEC, Carolinas, and Piedmont that Criteria 2a and 2b are equally met by both applicants suggests that the ALC applied the Criteria in an incorrect manner.

with regulatory requirements based on factual findings that were irrelevant to the regulatory criteria).

Criterion 2c provides that the "proposed project should provide services that meet an identified (documented) need of the target population." S.C. Regs. 61-15 § 802.2(c). The ALC erred as a matter of law in concluding that Piedmont better meets this Criterion because it did not consider the respective services to be provided by respective hospitals. The ALC made no findings regarding the extent to which FMMC and CMC-FM would offer similar or different services or which services provided by FMMC and CMC-FM would better meet the needs of the target population. Instead, it based its conclusion on factors completely irrelevant to Criterion 2c, namely the threat of decreased utilization and the purported strengthening of the York County healthcare providers' ability to meet the healthcare needs of the county's residents. Thus, the ALC again exceeded its authority by relying on factors not included in Criterion 2c and incorrectly analyzed which applicant better meets Criterion 2c by applying a standard that completely disregards the legal criteria set forth in the regulation.

Criterion 2e provides that "[c]urrent and/or projected utilization should be sufficient to justify the expansion or implementation of the proposed service." S.C. Regs. 61-15 § 802.2(e). This Criterion seeks to ensure that hospital beds do not sit empty and unnecessarily duplicate other beds and that the costs associated with constructing the hospital can be recouped through sufficient utilization. Thus, Criterion 2e implements the CON Act's purposes of promoting cost containment and avoiding unnecessary duplication of health care facilities and services. *See* S.C. Code Ann. § 44-7-120.

While the ALC concluded that Piedmont better meets this Criterion based, in part, on utilization projections, it subverted the Criterion's purpose by arbitrarily and capriciously applying it in disregard of the mandate to determine whether projected utilization is "sufficient" to justify the proposed facility. The ALC did this by finding that Piedmont's proposed less-utilized hospital better meets Criterion 2e than Carolinas' proposed better-utilized hospital because Carolinas would be over-utilized. According to the ALC, Piedmont better meets Criterion 2e because "CMC-FM's own projections show that, by the third year of operation, it would be operating at an occupancy level that would justify the approval of new beds. . . . These projections are further evidence that [Carolinas'] proposed facility would be too small to fully meet the demand." (R. p. 118). This rationale cannot be squared with Criterion 2e, which seeks to ensure that a proposed facility is justified by sufficient utilization.

If the Court accepts the ALC's conclusion that CMC-FM would be better utilized than FMMC and too small to fully meet demand, then *a fortiori,* Carolinas' projected utilization is sufficient to justify the implementation of CMC-FM under Criterion 2e and better meets this Criterion. Rather than reach this logical conclusion under the plain language of Criterion 2e, the ALC effectively turns Criterion 2e on its head by ruling that Carolinas does not better meet it because Carolinas will have *more* than sufficient utilization to justify the facility. As a result, the ALC arbitrarily and capriciously determined that Piedmont better meets Criterion 2e. *See MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 392 S.C. 314, 709 S.E.2d 626 (2010) (rejecting DHEC's interpretation of CON Act that conflicted with Act's purpose of promoting cost containment and preventing unnecessary duplication of healthcare facilities and services).

By contrast, DHEC applied the correct standard for determining which applicant's utilization projections are more sufficient to warrant the new hospital under Criterion 2e. During the trial, DHEC reviewer Beverly Brandt testified that Carolinas better meets Criterion 2e because its "projections were based on their high level of their current market share." (R. p. 1202, lines 5-9). She also testified that she did not find Piedmont's utilization projections plausible because it "had been steadily losing market share and . . . utilization of their services was substantially declining. And then they felt that . . . building this hospital that all of a sudden the market share was going to increase substantially." (R. p. 1202, line 21-p. 1203, line 7; *see also*, R. p. 2181). Thus, DHEC correctly applied Criterion 2e in accordance with its plain language.

Based on the legal errors made by the ALC in applying Criteria 2a, 2b, 2c, and 2e and its arbitrary and capricious reasoning discussed above, the Court should vacate the ALC's conclusions regarding these Criteria and reinstate DHEC's conclusions that Carolinas and Piedmont equally meet Criteria 2a, 2b, and 2c and that Carolinas better meets Criterion 2e.

C. The ALC disregarded the plain language of Criterion 3d and erroneously based its conclusion in favor of Piedmont on irrelevant factors.

The ALC erred in applying Project Review Criterion 3d by disregarding the plain language of the regulation and basing its conclusion on findings regarding the alleged patient acceptance practices of a small number of autonomous physician practices that will not control CMC-FM's admission policies.

Criterion 3d requires that "[t]he **proposed facility** should not restrict admissions. If any restrictions are applied, their nature should be clearly explained." S.C. Regs. 61-15 § 802.3(d) (emphasis added). Although DHEC found that both applicants equally

meet this Criterion, the ALC reversed DHEC's conclusion and concluded that Piedmont better meets it. Significantly, the ALC did not determine that CMC-FM would restrict admissions or deny access to patients in any way. Rather, the ALC's sole rationale for determining that Piedmont better meets Criterion 3d is that "CPN practices in York County limit access for indigent, Medicaid, and even Medicare patients. Whereas Piedmont and the non-contractually bound physicians who have privileges there do not." (R. p. 119). Thus, the ALC did not decide Criterion 3d on the actual admission policies and practices of Carolinas or CMC-FM but on the internal policies of individual physician practices within CPN. The plain language of Criterion 3d, however, restricts the assessment to whether the "proposed facility" would restrict admissions.

The ALC's reliance on the purported practices of a small number of CPN physicians excluding certain patients is especially problematic in this instance because it disregards the distinction between Carolinas and CPN. The ALC based its conclusions that CPN physicians restrict acceptance of medically underserved patients on telephone surveys of CPN physician practices conducted by Piedmont's expert, David Levitt, under the false pretense that he was seeking medical treatment for a family member. (R. p. 109; pp. 699, line 1-p. 722, line 20). This finding demonstrates that the Court incorrectly conflated Carolinas with CPN even though CPN is comprised of individual physician practice groups which establish their own practices for accepting Medicaid, Medicare, and uninsured patients. (R. p. 1510, lines 10-18; p. 1517, line 14-p. 1518, line 7; p. 1532, line 24-p. 1533, line 11). Although the only testimony in the record was that Carolinas does not have a policy restricting the acceptance of Medicaid, Medicare, and uninsured patients by its hospitals or physicians (*id.*) and that Carolinas would not restrict

admissions of such patients at CMC-FM (R. pp. 2147, 7860-7863), the ALC concluded that Carolinas did not better meet Criterion 3d. Thus, the ALC erroneously determined this Criterion on alleged practices of certain physician practice groups that do not control the admission policies of Carolinas. This is not permitted under the plain language of Criterion 3(d).

In addition, the ALC's ruling is arbitrary and capricious because it is undermined by other findings made regarding Carolinas' admissions practices. For example, the ALC concluded that Carolinas and Piedmont equally meet Criterion 3g, which provides that the facility should establish provisions to insure that individuals in need of medical treatment will have access to service, regardless of ability to pay. S.C. Regs. 61-15 § 802.3(g). The ALC provided no explanation for the determination that the applicants equally meet this Criterion. (R. p. 120). As a result, it is impossible to determine how the ALC can reconcile its seemingly contradictory conclusions that Carolinas will restrict access to indigent patients at the same time that Carolinas ensures access to healthcare to individuals regardless of their ability to pay.

The inconsistencies in the ALC's reasoning with regards to access to care did not end there. For example, after noting that between 45-80 percent of admissions came through the emergency rooms of several of Carolinas' nearby facilities and that a majority of inpatient admissions normally come through the emergency room, the ALC found that Carolinas "has no control over who presents at the emergency departments of its hospitals." (R. p. 88). This is significant because the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, requires hospitals to provide emergency health care treatment to anyone who comes to an emergency department for

treatment regardless of ability to pay. Thus, the ALC implicitly recognized that Carolinas' cannot and will not restrict a majority of its patient base from receiving healthcare at CMC-FM but ignored this inconvenient fact in awarding Criterion 3d in Piedmont's favor.

Remarkably, during the Second Contested Case hearing the ALC reached the contradictory conclusion that the evidence on which it relied in the Amended Final Order to determine that Piedmont better meets Criterion 3d was of limited probative value. The ALC determined that CMC-FM would restrict admissions based on telephone surveys overseen by Piedmont's expert witness, Mr. Levitt. (R. p. 109). After Carolinas objected to the introduction of this evidence (R. pp. 139-142, p. 276, line 10-p. 279, line 8; p. 702, line 15-p. 719, line 12), the ALC agreed that it was unreliable:

> [B]ecause of the limited size of the survey group, the fact that Mr. Levitt did not conduct all of the surveys, the very limited nature of the survey questions asked and the lack of identity of parties answering Mr. Levitt and the other employee's questions at the various practices, the Court finds that this evidence is of limited probative value.

(R. p. 718, line 19-p. 719, line 2). Nevertheless, the ALC relied specifically on the surveys to conclude that Piedmont better meets Criterion 3d, further demonstrating the arbitrary and capricious nature of its conclusion.

Criterion 3d does not permit the ALC to base its determination as to whether an applicant will restrict admissions based on the patient acceptance practices of autonomous physician practice groups that do not control the proposed facility's admissions policies. By doing exactly that, though, the ALC exceeded its authority, misapplied the Criterion, and then compounded that legal error by basing it on evidence, which, in the ALC's own words, is "of limited probative value" and based off of a

"limited" sample size. Therefore, the ALC's conclusion that Piedmont better meets Criterion 3d is arbitrary, capricious, and legally flawed, and DHEC's finding that the applicants equally meet Criterion 3d should be reinstated.

D. <u>The ALC erred by only partially conducting the required analysis under Criterion 16c.</u>

The ALC erred in applying Criterion 16c because it only partially considered the factors relevant to that Criterion. Criterion 16c requires that the "impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of other providers of similar services should be considered if the data are available." S.C. Regs. 61-15 § 802.16(c). DHEC found that Carolinas and Piedmont equally meet Criterion 16c, but the ALC reversed that decision and found that Piedmont better meets it. The only justification given by the ALC for this conclusion is the following:

> The effect on Piedmont of the loss of over one thousand (1000) patients and millions of dollars a year will make it more difficult for the hospital to recoup its fixed costs. Its associated costs per unit of services associated would increase. As a result, the operation of CMC-FM would have an adverse effect on existing providers.

(R. p. 121)

The ALC's determination of Criterion 16c is legally flawed because it fails to consider the two applicants' respective impacts on their own services and patient charges. Although this is the primary assessment that must be conducted under Criterion 16c, the ALC completely disregarded it. Instead, it based its conclusion regarding this Criterion solely on a one-sided analysis of CMC-FM's impact on Piedmont. While Criterion 16c permits the ALC to consider this data, if available, it does not permit the ALC to ignore the primary factor of evaluating the impact of the applicant's project on its own services

and charges. Because the ALC ignored this primary factor, its conclusion as to Criterion 16c is legally incorrect. *See Sierra Club*, 2014 S.C. App. LEXIS 201 at *32-33, *39-41 (ruling that ALC erred in finding compliance with regulatory criteria where it only conducted one part of the two-part analysis required under the regulation). Therefore, its conclusion that Piedmont better meets Criterion 16c should be vacated, and DHEC's finding that the applicants equally meet this Criterion should be reinstated.

E. The ALC arbitrarily and capriciously decided Criterion 6b in contravention of its purpose of ensuring projected revenues will be supported by sufficient utilization.

The ALC erred in reversing DHEC's finding that Carolinas better meets Criterion 6b by arbitrarily and capriciously deciding that Piedmont's less-utilized proposed hospital better satisfies this Criterion, which is intended to ensure that a project's revenues will be supported by sufficient utilization.

Criterion 6(b) provides that "projected levels of utilization should be reasonably consistent with those experience by similar facilities in the service are and/or state. In addition, projected levels of utilization should be consistent with the need level of the target population." S.C. Regs. 61-15 § 802.6(b). This Criterion falls under the regulatory heading of "Projected Revenues," which indicates that its purpose is to ensure that the projected utilization is reasonable and will generate sufficient revenue to justify the project. As explained by Piedmont's expert, Mr. Levitt, projected utilization is addressed in the Projected Revenue section of the CON regulations "[b]ecause the utilization will drive the financial pro-forma." (R. p. 812, lines 16-21).

When this purpose is considered, it is clear that DHEC appropriately applied this Criterion to determine that it is better met by Carolinas because Carolinas' current market

share in Northern York County will ensure that the hospital will be financially successful. (R. p. 2182). In contrast, the ALC's conclusion that Piedmont better meets Criterion 6b contravenes the Criterion's purpose by deciding it in favor of Piedmont's proposed less-utilized hospital. The ALC expressly found that "FMMC's projected levels of utilization are lower" than CMC-FM, but nevertheless concluded that Piedmont better meets Criterion 6b. (R. p. 123) According to the ALC's fallacious reasoning, Piedmont better meets a Criterion intended to assess whether a project will have sufficient utilization to ensure reasonable revenue projections despite that Piedmont has considerably less market share in Northern York County and proposes to construct a significantly larger hospital that will be less-utilized than the competing hospital sought by Carolinas.

This ruling is arbitrary and capricious because it cannot be rationally concluded that a less-utilized hospital will better fulfill the Criterion's purpose of ensuring sufficient revenues derived from reasonable utilization projections. By contrast, DHEC correctly applied Criterion 6b and awarded it in favor of Carolinas because Carolinas' utilization projections are based on its current dominant market share in Northern York County. Accordingly, the Court should vacate the ALC's conclusion as to Criterion 6b and reinstate DHEC's conclusion as to this Criterion. *See MRI at Belfair, LLC*, 392 S.C at 322, 709 S.E.2d at 630 (refusing to defer to DHEC's interpretation of CON regulation that was "manifestly at odds with legislative intent" of CON Act).

F. <u>The ALC arbitrarily and capriciously decided Criterion 17 in favor of the larger, more expensive, and less utilized hospital proposed by Piedmont.</u>

The ALC arbitrarily and capriciously decided that Piedmont better meets Project Review Criterion 17 by finding that the larger, more expensive, less-utilized hospital of

Piedmont would be more efficient than Carolinas' smaller, less expensive, better utilized hospital.

Criterion 17 requires that the "proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size." S.C. Regs. 61-15 § 802.17. DHEC concluded that Carolinas better meets this Criterion because Carolinas "already has a significant market share" and that CMC-FM "would shift [Carolinas'] existing market share into a South Carolina facility." (R. p. 2183) It also found that Piedmont's 100-bed "project is the most costly and they provide no information to support" Piedmont's alleged economies of scale. (*Id.*)

The ALC reversed this finding, concluding that Piedmont better meets Criterion 17 because "its proposal fosters economies of scale by spreading costs over a greater number of beds." (R. p. 123). This conclusion was supported by the finding of fact that "it is more efficient to build a 100 bed hospital capable of meeting future need for services than to build a 64 bed facility that requires expansion within a few years of opening." (R. p. 113).

The ALC's conclusions as to Criterion 17 are arbitrary and irrational. The ALC concluded that FMMC, which will have more empty beds, fewer patients, be more expensive to build and operate, and is sponsored by an applicant with an eroding patient base, will be more efficient than CMC-FM, which will be smaller, better utilized, cheaper to build, and sponsored by the applicant with the dominant market share in the surrounding area. It is illogical to determine, as the ALC does, that Piedmont will improve efficiency when it already operates a nearby underutilized hospital and continues to lose market share in Northern York County. *See Deese v. S.C. State Bd. of Dentistry*,

286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary and capricious if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.") Therefore, the Court should vacate the ALC's conclusion as to Criterion 17 and reinstate DHEC's conclusion that Carolinas better meets it.

CONCLUSION

For the foregoing reasons, Carolinas requests that the Court vacate the ALC's Amended Final Order and reinstate DHEC's issuance of the Fort Mill CON to Carolinas. In the alternative, Carolinas requests that the case be remanded to the ALC for a determination of which applicant most fully complies with the requirements, goals, and purposes of the CON Act, the 2004-2005 Plan, Criteria, and other applicable regulations in accordance with the appropriate legal standards discussed above.

Respectfully submitted,

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

July 31, 2015

BKT 110; PLDI 1

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center .....Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill .....Respondents,

Of whom The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is.....Appellant.

FINAL BRIEF OF RESPONDENT AMISUB OF SOUTH CAROLINA, INC. D/B/A PIEDMONT MEDICAL CENTER, D/B/A FORT MILL MEDICAL CENTER

Stuart M. Andrews, Jr.
SC Bar No. 000400
E-Mail: stuart.andrews@nelsonmullins.com
Daniel J. Westbrook
SC Bar No. 012939
E-Mail: dan.westbrook@nelsonmullins.com
Susannah Knox
SC Bar No. 100954
E-Mail: susannah.knox@nelsonmullins.com
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Administrative Law Court's application of South Carolina CON law as it is written violated the dormant Commerce Clause of the United States Constitution, when: approval of Appellant's project would adversely impact the public by decreasing accessibility to quality, specialized healthcare services, particularly for the medically underserved; the ruling affects interstate commerce to no greater degree than it affects intrastate commerce; the ruling serves the purposes of the South Carolina CON Act better than they could be served by any other available means; and when any incidental effect on interstate commerce is outweighed by the putative local benefits?

II. Whether the Administrative Law Court's approval of Respondent's Certificate of Need application without making a finding that it complied with the bed transfer criteria of the South Carolina Health Plan was erroneous, when: Appellant did not raise the issue below and therefore did not preserve it for appeal; the transfer criteria of the South Carolina Health Plan do not apply to Respondent's transfer; and every individual criterion whose substance was raised below was ruled on by the Administrative Law Court?

III. Whether the Administrative Law Court's decision was erroneous, arbitrary, or capricious, when it found that Appellant's proposal would decrease accessibility and when it relied on relevant factual findings, supported by substantial evidence, in concluding that Respondent's project better met project review criteria than Appellant's?

STATEMENT OF THE CASE

The 2004-05 South Carolina Health Plan (the "State Health Plan" or "Plan") identified a need for 64 additional acute care hospital beds in York County. Based on the need identified in the Plan, in 2005 the South Carolina Department of Health and Environmental Control ("DHEC") received four competing applications for a Certificate of Need ("CON") to build a hospital near the town of Fort Mill, located in the northeastern portion of York County, near Charlotte. The four applicants were Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"), The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System ("CHS"), Presbyterian Healthcare System ("Presbyterian"), and Hospital Partners of America, Inc. ("HPA"). On March 11, 2005, CHS, Presbyterian, and HPA each filed competing applications to construct and operate a 64-bed hospital. Piedmont also initially applied to construct and operate a 64-bed hospital. However, on October 6, 2005, Piedmont submitted a new application for a 100-bed hospital, to be called Fort Mill Medical Center ("FMMC").[1] CHS's proposed hospital would be called Carolinas Medical Center – Fort Mill ("CMC-FM"). By decision letters dated May 30, 2006, DHEC approved Piedmont's application and denied the other applications. CHS and Presbyterian filed separate contested case

[1] Piedmont Medical Center, located in Rock Hill, is the only acute care hospital in York County. It is not a legal entity, but a "d/b/a" of Amisub of South Carolina, Inc. FMMC would not be a separate legal entity, but simply another "d/b/a." (R. p. 361, lines 10-23). Piedmont's application proposes to transfer 36 of its existing beds to FMMC, in addition to applying for the 64 new beds authorized by the Plan, giving FMMC a total of 100 beds.

actions in the South Carolina Administrative Law Court (the "ALC"), which were later consolidated. (R. pp. 75-76).

A final hearing was held before the Honorable Carolyn C. Matthews September 9-25, 2009. At the close of their cases, Petitioners CHS and Presbyterian moved for summary judgment. (R. p. 76). On December 9, 2009, Judge Matthews issued an Order granting summary judgment and ruling that DHEC had erroneously interpreted the Plan to allow only existing providers to obtain a CON. (R. pp. 26-27). Judge Matthews remanded the matter to DHEC to determine which, if any, of the applicants were entitled to the CON. (R. p. 27).

On September 9, 2011, following a second administrative review, DHEC issued a staff decision approving CHS's application and denying the applications of Piedmont and Presbyterian, both of whom sought DHEC Board review. After the Board declined review, Piedmont and Presbyterian filed contested case actions in the ALC. The cases were consolidated after being assigned to the Honorable S. Phillip Lenski. During the course of litigation, Presbyterian withdrew from the case. Judge Lenski presided over a final hearing with the remaining parties from April 8 to May 7, 2013. (R. pp. 74, 77).

On March 31, 2014, Judge Lenski issued a Final Order awarding the CON to Piedmont. (R. p. 34). On April 9, 2014 CHS filed a Motion for Reconsideration. (R. p. 227). On May 2, 2014, the ALC vacated the Final Order. (R. p. 73). On December 15, 2014 the ALC issued an Amended Final Order, again approving Piedmont's application and denying CHS's. (R. p. 74). On January 14, 2015, CHS filed a Notice of Appeal.

ARGUMENT

CHS does not challenge the facial validity of South Carolina's CON law, only the ALC's application of it. CHS misunderstands or misrepresents that the purpose and effect of the ALC's Order is to protect the existing providers. Instead, the ALC applied the law as written in order to protect the public, consistent with the purposes of state CON law. As required by law, the ALC reached its decision by carefully considering the adverse effects CHS's proposal would have on accessibility to local healthcare services for residents of York County.

I. Legal Background

A. The Dormant Commerce Clause

The Constitution grants Congress the power "to regulate Commerce . . . among the several states." U.S. Const. art. 1, § 8. The Supreme Court has long recognized a dormant aspect of the Commerce Clause, limiting the power of states to erect barriers against interstate trade. *Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005).

Courts apply a two-tiered analysis of dormant Commerce Clause claims. *Id.* The first tier focuses on discrimination. *Id.* "'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Colon Health Centers of America, LLC v. Hazel*, 733 F.3d 535, 542-43 (4th Cir. 2013) ("*Colon Health Ctrs. I*") (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). "In conducting the discrimination inquiry, a court should focus on discrimination against ***interstate***

commerce – not merely discrimination against the specific parties before it." *Colon Health Ctrs. I* at 543 (emphasis in original), *citing Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978). A statute may discriminate facially, in its practical effect, or in its purpose. *Colon Health Ctrs. I* at 543. In order to prove discriminatory effect, a plaintiff must demonstrate that the challenged law "would negatively impact interstate commerce to a greater degree than intrastate commerce." *Id.* Discriminatory laws that amount to "simple economic protectionism" are subject to "a virtually *per se* rule of invalidity." *Yamaha* at 567. Such laws "will be struck down unless the state demonstrates 'both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

The second tier focuses on undue burden. *Yamaha* at 567. A deferential, "rational basis" review applies. *Yamaha* at 569; *Colon Health Centers of America, LLC v. Hazel, 2014 WL 5430973* at *5 (E.D. Va. 2014) ("*Colon Health Ctrs. II*"). The test is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970): "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. "If a legitimate local purpose is found, then the question becomes one of degree," which "will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

In analyzing undue burden, a court must bear in mind that the Constitution "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-44 (1960). Indeed, "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Philadelphia v. New Jersey,* 437 U.S. 617, 623-24 (1978). Consequently, "when evaluating state health and safety regulations, courts 'must give deference to the State's choice to protect its citizens in [a certain] way' when evaluating the putative local benefits of the law." *Yakima Valley Mem. Hosp. v. Washington State Dept. of Health,* 2012 WL 2720874 at *3-4 (E.D. Wash. 2012) (quoting *Nat'l Ass'n of Optoms. & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 527 (9th Cir 2009)).

The discrimination test and the undue burden test "are not separated by a bright line." *Colon Health II* at *5. Indeed, "[w]hile these rules are easy to recite, their application to a particular factual setting is often difficult." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). As a result, "the Supreme Court has cautioned that the dormant Commerce Clause inquiry should be undertaken by 'eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects.'" *Walgreen* at 55 (quoting *West Lynn Creamery v. Healy,* 512 U.S. 186, 201 (1994)). Both the discrimination and undue burden tests are "fact-based." *Colon Health Ctrs. I* at 546.

B. South Carolina CON Law

S. C. Code Ann. § 44-7-110, et seq. (the "CON Act") requires a person or health care facility to obtain a CON before undertaking the construction or

establishment of a new health care facility, including a hospital. *Id.* §§ 44-7-130(10); 44-7-160(1). The purposes of the CON Act are to: (a) promote cost containment; (b) prevent unnecessary duplication of health care facilities and services; (c) guide the establishment of health facilities and services which will best serve public needs; and (d) ensure that high quality services are provided in health facilities in this State. *Id.* § 44-7-120.

The CON Act authorizes DHEC to administer the CON program in South Carolina, *id.* § 44-7-140, and requires DHEC to publish, at least every other year, a State Health Plan. *Id.* § 44-7-180(A), (B). Regulation 61-15 § 802 sets forth project review criteria applicable to CON applications. In the case of competing applications, DHEC must award the CON to the applicant who most fully complies with the requirements, goals, and purposes of the CON Act, the State Health Plan, and regulatory criteria. *Id.* § 44-7-210(B).

II. The ALC's Application of South Carolina CON Law

CHS's argument that the ALC's application of the CON law violates the dormant Commerce Clause relies heavily on its own misrepresentation of what the ALC actually did. As described below, the ALC applied the CON law as written, without discriminating against or unduly burdening interstate commerce.

A. Adverse Impact

1. The Principle Behind Adverse Impact

The principle of adverse impact runs throughout the CON Act, the State Health Plan, and the regulatory criteria. The CON Act requires DHEC to include in each State Health Plan a finding as to whether the "benefits of improved accessibility" created by proposed facilities or services "outweigh the adverse effects caused by the duplication of any existing facility" or service. S.C. Code § 44-7-180(B)(4). The 2004-2005 South Carolina Health Plan made such a finding, noting that "the benefits of improved accessibility will be ***equally weighted*** with the adverse effects of duplication in evaluating Certificate of Need applications for [acute care hospital] beds." (R. p. 4017) (emphasis added).

In addition to the State Health Plan, the regulatory project review criteria also reflect the emphasis the General Assembly and DHEC Board have placed on the need to thoroughly assess the potential adverse effects of new projects. Four separate criteria specifically require DHEC and the court to evaluate the impact of a proposed CON project on: the ability of existing health care providers to serve medically underserved groups (Criterion 3(h)); the costs and charges of existing providers (Criterion 16(c)); the distribution of existing health services to the target population (Criterion 22); and utilization of existing facilities (Criterion 23(a)). S. C. Code Regs. 61-15 § 802 (3)(h), (16)(c), (22), and (23)(a).

The emphasis on adverse impact is consistent with the purposes of the CON Act and the basic principles of health planning. As Piedmont's expert health planner, Daniel J. Sullivan, testified at trial:

> I think the two key factors in any health planning decision are what's the benefit that's going to derive to the community and what's the negative impact on ***existing services in the community*** that would result from approving it. If we only looked at, for example, accessibility . . . you'd have a hospital in every corner . . . [F]rom a general health planning perspective . . . impact always has to be given a very high priority . . . .

(R. p. 1154, line 16 – line 7) (emphasis added). The principle behind the health planning concept of adverse impact is not, therefore, primarily protection of local providers, but protection of the local health care system and the public.

Mr. Sullivan testified that approval of CMC-FM would be detrimental to Piedmont, but, more importantly, it would be "detrimental to the quality and availability of healthcare services to York County residents." (R. p. 1145, lines 3-16). Judge Lenski agreed:

> One of the principal differences between the applicants is that the approval of CMC-FM would have the effect of causing the erosion of quality of care at Piedmont and among specialists practicing there as a result of the diminution in the volume of patients and the degradation of the payor mix of the patients who would continue to be seen at Piedmont. Consequently, there would be no hospital in York County providing many of the high quality and tertiary services that Piedmont has added. Alternatively, the establishment of FMMC will ensure that high quality services continue to be provided and added within York County.

(R. p. 125, Conclusion of Law ("CL") 47; *see* R. p. 1151-1153) (testimony of Mr. Sullivan.)

Piedmont has won a number of impressive quality awards for its services. (R. pp. 78-79, Findings of Fact ("FF") 2). "In addition to standard community hospital services, Piedmont Medical Center provides specialized services not usually offered by

a hospital its size, including open heart surgery, neurosurgery, cardiac catherization, vascular surgery, neonatal intensive care, specialized women's and pediatric services, and behavioral health." (R. p. 78, FF1).

As acknowledged by CHS official Del Murphy, CMC-FM would not offer specialized or tertiary services. (R. p. 1322, lines 9-12; p. 1324, lines 1-4). Instead, CHS-employed physicians would refer patients needing such services out of York County to CMC-Pineville and other CHS facilities. (R. p. 96, FF 49). These facts form the foundation for Judge Lenski's conclusion that CMC-FM, if approved, would adversely impact the public. Additional factual findings support this conclusion, including:

- "[O]utmigration of complex specialty services [from York County] would not only continue, but also would likely accelerate . . . . Piedmont's specialty programs, which require certain minimum volume levels to maintain quality and proficiency, as well as economic viability, would be jeopardized . . . . Loss or paring of Piedmont's specialty programs would be detrimental to York County citizens, especially those living in the western, more rural part of the country . . . ." (R. pp. 96-97, FF 50).

- "To maintain services to medically underserved groups and to sustain profitability, a hospital must have a strong base of managed care and commercial patients . . . . The construction of CMC-FM would further erode Piedmont's payor mix . . . . jeopardizing [its] ability to care for medically underserved individuals and maintain their current level of services . . . ." (R. p. 97, FF 52-53).

- As a result of payor mix erosion from approval of CMC-FM, "the quality of care at Piedmont would suffer and the ability to recruit new physicians would be impaired." (R. p. 98, FF 56).

- CMC-FM would restrict admissions of medically underserved patients. (R. p. 110, FF 99).

- Lower patient utilization would increase Piedmont's costs. (R. p. 99, FF 58).

2. Criterion 16(c) – Impact on Cost

Criterion 16(c) provides:

> The impact of the project upon the applicant's cost to provide services and the applicant's patient charges should be reasonable. The impact of the project upon the cost and charges of other providers of similar services should be considered if the data are available.

S. C. Code Regs. 61-15 § 802(16)(c). Thus, the criterion focuses on two different potential adverse impacts: the first, upon the applicant's own costs and charges and the second on the costs and charges of "other providers of similar services." *Id.* As for the first part of Criterion 16(c), the ALC found that both Piedmont's and CHS's proposed costs were "reasonable" and their costs and charges "comparable" and "consistent" with those experienced by similar facilities. (R. pp. 110-112, FF 101, 103-05; p. 123, FF 38).

As for the second part of Criterion 16(c), the ALC considered, as the criterion requires, the impact of CHS's project upon Piedmont and York County independent physicians, as the only other relevant providers of similar services. Judge Lenski found that, if approved, CHS's project would cause a significant loss of patients for Piedmont, which in turn would cause an increase in costs. (R. p. 99, FF 58, *citing* Tr. at 686:15-24 (R. p. 806, lines 15-24)). There was no evidence presented that the approval of Piedmont's project would affect CHS's costs. For these reasons, Judge Lenski concluded that Criterion 16(c) was better met by Piedmont than by CHS. *See* R. p. 121, CL 32).

CHS contends that the ALC "essentially determined that Piedmont better meets Criterion 16(c) because CMC-FM will make Piedmont less profitable." CHS Initial Brief at 18. The ALC, however, applied Criterion 16(c) exactly as written and found that CMC-FM would increase Piedmont's costs. (R. p. 99, FF 58). An increase in cost is not only inconsistent with the cost containment purpose of the CON Act, it is one of a number of factors the ALC identified as likely to contribute to adversely affecting public access to healthcare services in York County. (R. p. 99, FF 58; p. 125, CL 47).

3. Criterion 22 – Impact on Distribution

Criterion 22 provides:

> The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population.

S.C. Code Regs. 61-15 § 802(22).

Criterion 22 directs a court to "carefully consider" a project's impact on the public, and that is what the ALC did. CHS denigrates the ALC's factual findings as "speculative," CHS Initial Brief at 19, but substantial evidence supports them. Three York County physicians, none of whom were contractually bound to either applicant, testified that approval of CMC-FM would reduce the quality of care and specialty services provided by Piedmont, impair its ability to recruit new physicians, and likely force closure of Piedmont's Women's Tower and the discontinuance of neonatal services. (R. pp. 98-99, FF 55-57). Forty-five York County physicians, not employed

by either applicant, submitted support letters for Piedmont.[2] (R. p. 97, FF 54). In their letters and in interviews with Piedmont's experts, many of these physicians shared the same concerns about which the three physician witnesses testified. The ALC considered these physician concerns "compelling evidence" that approval of CMC-FM would have an adverse effect on the distribution of services to York County residents. (R. p. 121, CL 33; *see* R. pp. 95-98, FF 47-50, 54-56).

4. Criterion 23(a) – Impact on Utilization

Criterion 23(a) requires a balancing test:

> The impact on the current and projected occupancy rates or use rates of existing facilities and services should be weighed against the increased accessibility offered by the proposed services.

S.C. Code Regs. 61-15 § 802(23)(a); *cf.* R. p. 4017).

The ALC found that CMC-FM would have a significant adverse impact on the current and projected occupancy rates or use rates of Piedmont. The ALC rejected as "unsound" CHS's argument that it would simply shift existing patients from various CHS hospitals to CMC-FM, thereby having absolutely no impact on Piedmont. (R. p. 121, CL 34; *see* R. p.p. 89-90, FF 34-36). Loss of patients means loss of income, as the ALC found in this case and as other administrative law judges have found. (R. p. 122, CL 35 and cases cited therein). The larger point, however, is one the Amended Final Order repeatedly makes, but one which CHS pretends not to see: Piedmont's lost patients and income mean a decrease in the quality, quantity, and scope of services available locally that will particularly affect the medically underserved. (R. pp. 96-99,

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[2] CHS received only one such support letter. (R. p. 97, FF. 54).

FF 47-60; p. 110, FF 99; p. 118, CL 19; p. 119-120, CL 24-28; pp. 124-125, CL 46-47). Approval of CMC-FM would adversely impact the public because it would decrease – not increase – access to services. As a result, the balancing test required by Criterion 23(a) tilts against CHS.

B. Community Need

Regulation 61-15 refers to Criterion 2 as "Community Need Documentation." S.C. Code Regs. 61-15 § 802(2). DHEC included Criteria 2(a-e) among the priority criteria for these competing applications. (R. p. 81, FF 11). Based on substantial evidence, the ALC concluded that Piedmont better met most of the community need criteria than CHS for two reasons. First, Piedmont's project would stem outmigration, while CHS's would escalate it. Second, Piedmont's proposed larger hospital would better meet public needs than CHS's proposed smaller facility. (R. p. 118, CL 18-19).

1. Community Need and Outmigration

CHS presents two arguments on the relationship between community need and outmigration. First, it contends that any effect its project would have on outmigration is "speculative." CHS Initial Brief at 23. Substantial evidence, however, supports the ALC's factual findings that CMC-FM would accelerate outmigration generally, but particularly with respect to patients needing specialized services and those covered by commercial insurance. (R. pp. 95-99, FF 46-59; pp. 105-110, FF 82-99).

Second, CHS contends that "the ALC seeks to reduce the amount of South Carolina residents receiving health care in North Carolina." CHS Initial Brief at 22. That statement, however, is incorrect. The Amended Final Order contains factual findings that future outmigration resulting from approval of CMC-FM would reduce the

quality of care and the scope of services available to York County residents in their home county. (R. pp. 95-99, FF 46-59; p. 124-125, CL 46-47). CMC-FM is planned strictly as a community hospital, offering primary and secondary services only. (R. p. 1322, lines 9-12; p. 1324, lines 1-4) (testimony of CHS official Del Murphy). CMC-FM patients needing more specialized services, such as those offered by Piedmont, would be referred by CHS-employed physicians[3] out of the county to CMC-Pineville or other CMC facilities. (R. p. 96, FF 49). This outmigration would seriously threaten Piedmont's ability to continue offering specialized services. (R. pp. 96-97, FF 50; pp. 124-125, CL 46-47; p. 393, line 19; p. 394, line 7; p. 1151, lines 25-7). In order to obtain tertiary or specialized services, therefore, residents of York County would be forced to leave their home county – not necessarily to North Carolina.

The ALC concluded that FMMC would "strengthen the York County healthcare system by reducing outmigration from York County." (R. p. 118, CL 19). The ALC applied the Community Need Criteria in a manner consistent with the public needs and quality of care purposes of the CON Act:

> This court concludes that the establishment of FMMC will best serve the ***public needs*** by reducing the outmigration of York County residents to hospitals beyond York County, and in so doing, will strengthen the existing healthcare system in York County that consists largely of Piedmont Medical Center and non-contractually bound physicians on the Piedmont medical staff. Approval of Piedmont's application will help stem outmigration and maintain ***quality of care***, while approval of CHS' will escalate outmigration and lead to an erosion of ***quality of care*** in York County, especially for specialty services.

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[3] CHS employs physicians through a subsidiary, Carolinas Physician Network ("CPN"). (R. p. 85, FF 23).

> For all these reasons, FMMC will better serve ***public needs*** than CMC-FM.

(R. p. 124-125, CL 46) (emphasis added); *see* S.C. Code Ann. § 44-7-120. The Order does not, as CHS asserts, evince an intent to reduce the number of South Carolina residents receiving health care in North Carolina; rather, it seeks to prevent the harmful effects that future outmigration would have on the availability of services to residents of York County.

2. Community Need and Hospital Size

CHS argues that the ALC applied the State Health Plan's transfer provision in a discriminatory manner, although it is impossible to see how this, like CHS's other arguments, is not a facial challenge to South Carolina CON law. CHS contends that it was disadvantaged because it could not take advantage of the bed transfer provision in the State Health Plan, but "was limited to proposing a 64-bed hospital." CHS Initial Brief at 24.[4] There are several flaws in CHS's argument.

First, CHS could have taken advantage of the bed transfer provision, but it simply never applied for a transfer. The Plan allows "affiliated hospitals" to transfer beds across county lines and does not specify that both hospitals must be within the same state. (*See* R. pp. 4016-4017). Moreover, CHS could have transferred beds from one of the four South Carolina hospitals in which it has an ownership interest. *See* Tr. at 1550:2-1551:31.

Second, CHS's argument that it was disadvantaged by being limited to a 64-bed proposal is inconsistent with the argument it forcefully, if ineffectually, presented at

[4] Since CHS never applied for a transfer, the ALC did not rule on whether it could transfer beds.

trial. CHS argued that a 100-bed facility would result in a "tremendous maldistribution" of hospital beds in the county. (R. pp. 101-102, FF 67). Far from claiming to be disadvantaged, CHS argued that its proposal was superior ***because*** it was smaller. (R. pp. 101-102, FF 67; pp. 2152-2153) (arguing that Piedmont's 100-bed proposal would "maldistribute" beds in the service area).

Third, the ALC did not base its decision solely on the number of beds each applicant proposed to start with, but also on each applicant's ability to accommodate future expansion in a rapidly growing area:

> Because of the growth projections in Northern York County, the hospital in Fort Mill should be designed to respond to the increased demands that will be placed on the facility over time. FMMC is designed to accommodate up to two hundred fifty (250) beds. Tr. at 2667:6-22. CMC-FM's design, however, envisions a potential future expansion of only eighteen (18) to twenty (20) beds. Tr. at 2628:5-20. The CMC-FM design contains no empty space reserved for future expansion (shell space). Tr. at 2567:24-2568:3. CHS presented no evidence of other space it could convert to accommodate additional space in the event of expansion.

(R. p. 101, FF 65). By choice, CHS's maximum potential size is only 84 beds. (R. p. 101, FF 65). In short, CHS designed its Fort Mill hospital to be a small community hospital providing primary and secondary services, referring tertiary patients to CHS facilities outside of York County. (*See* R. p. 1324, lines 1-4). Consistent with the CON regulations, the ALC found that this model failed to meet the needs of the growing community in the affected area.

C. Efficiency

Criterion 17, entitled "Efficiency,"[5] provides:

> The proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size.

S.C. Code Regs. 61-15 § 802(17).

The ALC found that Piedmont's project was more efficient and better satisfied Criterion 17 "because its proposal fosters economies of scale by spreading costs over a greater number of beds." (R. p. 123, CL 41). Again, CHS argues that the bed transfer provision disadvantaged it unfairly. CHS Initial Brief at 25. As discussed above, CHS's position is flawed for several reasons, not the least of which being that the ALC based its decision in part on CHS's own design choice, which intentionally limits its ability to expand. (R. p. 123, CL 41). Any significant expansion for CMC-FM would require construction, which would be both "expensive and potentially disruptive." (R. p. 101, FF 65).

III. The ALC's Application of South Carolina CON Law Did Not Violate the Dormant Commerce Clause.

South Carolina CON law, as written and as applied in this case, is not intended to protect local providers from competition, but to protect public access to local services, without regard to whether any particular provider has an established local presence. Indeed, in the present case, both applicants are owned by out-of-state companies with existing in-state facilities.

The critical facts of the present case are these:

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[5] CHS refers to Criterion 17 as "Financial Feasibility." CHS Initial Brief at 24.

1) If CMC-FM were approved, it would not provide specialized, tertiary services in York County. (R. p. 1322, lines 9-12; p. 1324, lines 1-4).

2) Approval of CMC-FM would jeopardize Piedmont's continuing ability to provide high quality tertiary, specialized services in York County. (R. pp. 96-99, FF 47-60; p. 118, CL 19; pp. 124-125, CL 46-47).

3) CMC-FM would restrict admissions for Medicaid and indigent patients. (R. p. 110, FF 99; pp. 119-120, CL 24-28).

4) The result would be decreased access to services for York County residents, particularly the medically underserved. (R. pp.96-99, FF 47-60; p. 110, FF 99; p. 118, CL 19; p. 119-120, CL 24-28; pp. 124-125, CL 46-47).

As described above, both the discrimination test and the undue burden test under the dormant Commerce Clause are fact-intensive. For this reason, cases cited by CHS about waste disposal, interstate trucking, stevedore permits, or milk processing give little practical guidance in resolving whether Judge Lenski's order unlawfully discriminates against or unduly burdens interstate commerce. None of these cases involve a situation like the present one, where except for the challenged law, certain local services would be significantly reduced or eliminated.

A. The Discrimination Test

1. The ALC's application of South Carolina CON law did not discriminate against interstate commerce.

The State Health Plan specifically required the ALC to weigh CMC-FM's adverse effects relating to duplication of services against any benefits it would bring of increased access. (R. p. 4017). The ALC found, however, that CMC-FM would

decrease, not increase, access to medical services for residents of York County, particularly those in rural and underserved communities. (R. P. 96-99, FF 47-60; p. 110, FF 99). Regulatory Criteria 16(c), 22, and 23(a) specifically required the ALC to consider CMC-FM's impact on cost, the distribution of medical services, and patient volume. The ALC found that CMC-FM's impact on all these areas would be adverse and significant. (R. pp. 121-122, CL 32-36). The ALC applied the state law as it is written and courts give greater deference to states in the regulation of health and medical services. *See Yakima* at *3-*4.

In analyzing whether the ALC's application of state CON law discriminates against interstate commerce, the "fulcrum" of the inquiry should be whether the Amended Final Order "erects a special barrier to market entry by non-domestic entities." *Colon Health Ctrs. I* at 546. The relevant focus is not on CHS or any particular CON applicant, but on "interstate commerce generally." *Id.* at 546; *see id.* at 543, *citing Exxon.*

Judge Lenski's order erects no special barriers to entry in the York County market. CHS could have been awarded the CON if it had convinced the ALC it would: (a) provide specialty, tertiary services at CMC-FM, or (b) ensure that Piedmont would be able to continue to provide those specialty services, or perhaps even (c) agree to enter into a contract with the county similar to Piedmont's. (*See* R. pp. 82-83, FF 12-14) (describing Piedmont's "impressive," long-term contract with York County, under which York County citizens derive "innumerable benefits"). CHS made no effort, however, to convince the court of (a) or (c). As for (b), CHS attempted to convince the ALC that CMC-FM would cause no impact on Piedmont because it would serve only

patients CHS shifted to CMC-FM from other CHS facilities. (R. p. 87, FF 28). The ALC, however, found that such a shift simply would not occur. (R. p. 87-90, FF 29-36).

Had there been a third competing applicant, its application would have been reviewed in the same manner. Regardless of its location, headquarters, or state of incorporation, the third applicant also would not have been approved if its adverse impact on accessibility for county residents outweighed any benefits of accessibility. (*See* R. p. 4017). This would be true even if the third applicant were a large, South Carolina-based hospital system, as Piedmont expert (and former DHEC CON Director) Joel Grice testified:

> Q: Mr. Grice, if it were instead of Carolinas, if it were Palmetto Health System that were proposing to build a hospital in Fort Mill and to shift patients needing complex care to Columbia instead of to Charlotte, would your analysis about the effect on Piedmont be any different?
>
> A: No sir.
>
> Q: Why not?
>
> A: Because here again, you have another provider from another area outside of that region that would be taking the patients away. Removing patients from the county and they would be getting – let's say Palmetto here in Columbia had a satellite up there, they would be referring their tertiary patients down to Columbia to Palmetto Health.
>
> Q: So, is your principal concern that Carolinas is located outside of state or that it's located outside of York County and that is the basis for the opinion you saw from 3(a)?
>
> A: It's outside of York County.

(R. p. 1094, line 14 – p. 1095, line 10). A major in-state hospital system would therefore be affected no differently by the law than CHS. *See Minnesota v. Clover Leaf Creamery,* 449 U.S. 456, 473, n. 17 (1981) (upholding state law against a dormant Commerce Clause challenge, in part because "[t]he existence of major in-state interests adversely affected by [a state law] is a powerful safeguard against legislative abuse").

To assume another scenario, suppose the State Health Plan identified a need for 64 additional hospital beds in a county adjacent to York County. Two applicants submit competing CON applications to build a hospital, one applicant being the only hospital located in the county and the second applicant being Piedmont. If the evidence proved that Piedmont's project would result in the diminishment or discontinuance of high quality specialty services in the county, Piedmont's application would likely be denied.

In other words, the CON laws, as written and as applied in this case, affect in-state and out-of-state, local and non-local entities the same. In a dormant Commerce Clause analysis, "[d]iscrimination simply means differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter." *Colon Health Ctrs. I* at 542-43. As illustrated above, there was no differential treatment in this case between in-state and out-of-state providers. There certainly is no evidence, despite CHS's bald assertions, of a discriminatory purpose by Judge Lenski. And in order to prove discriminatory effect, CHS would have to demonstrate that the ALC's application of state CON law "would negatively impact interstate commerce to a greater degree than intrastate commerce." *Id.* at 543.

It is also significant that Piedmont and CHS hardly fit the stereotypes of insider and outsider. Piedmont is a subsidiary of Tenet Healthcare Corporation, a Texas-based company that owns 49 hospitals in ten states. (R. p. 78, FF 1). As CHS official Del Murphy testified, Tenet is "more of a national healthcare system" than CHS. Tr. at 1548:24-1549:1. According to Mr. Murphy, CHS is a "North Carolina and South Carolina Healthcare System focused entirely really on those two states." Tr. at 1548:18-24. CHS currently has an ownership or management interest in several South Carolina hospitals, surgery centers, and freestanding emergency departments. Tr. at 1550:2-1551:31; CHS Trial Ex. 18. In addition, CHS is a 50 percent owner (with, ironically, Amisub) of a radiation therapy center ***in York County***. Tr. at 1550:5-9. In other words, both Tenet and CHS are based outside of South Carolina but have existing facilities in the state and the county.

In *Colon Health Ctrs. I*, two out-of-state plaintiffs challenged Virginia laws requiring them to obtain a Certificate of Public Need ("COPN") before operating certain medical equipment in the state. The court of appeals, noting the fact-based nature of a dormant Commerce Clause analysis, reversed a lower court order dismissing the case and remanded for further factual development, *id.* at 546, 549, providing the district court with several guiding principles:

- "Modern dormant Commerce Clause jurisprudence is motivated primarily by a desire to limit economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 542, *citing Dept. of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008).

- "Discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and

burdens the latter." *Id.* at 542-43, *citing Oregon Waste Sys.*, 511 U.S. 93, 99 (1994).

- "In order to prove discriminatory effect . . . plaintiffs must demonstrate that the challenged statute, if enforced, would negatively impact interstate commerce to greater degree than intrastate commerce." *Id.* at 543, *citing Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001).

- "In conducting the discrimination inquiry, a court should focus on discrimination against ***interstate commerce*** – not merely discrimination against the specific parties before it." *Id.* at 543 (emphasis in original), *citing Exxon* at 127.

Colon Health I at 542-543.

On remand, the district court granted the defendants' motion for summary judgment. *Colon Health Ctrs. II* at *7. The district court began its analysis with an observation:

> When a state exercises its traditional authority to regulate public health, resultant burdens inevitably fall on business ventures that would otherwise operate without legal restraint in an unregulated market. That Virginia's COPN program may make it more difficult for Plaintiffs to enter the Virginia medical services market is insufficient to demonstrate a dormant Commerce Clause violation.

Id. at *5.

On remand, defendants presented evidence that over a 14-year period COPN approval rates for in-state and out-of-state applications had been "virtually identical." *Colon Health Ctrs. II* at *5. In response, Plaintiffs, like CHS in the present case, argued that, as applied to them, the program was discriminatory. The court rejected plaintiff's argument and upheld the law, as the dormant Commerce Clause "protects the interstate market, ***not particular interstate firms*** . . . ." *Id.* (quoting *Exxon*, 437 U.S. at 127-28 (emphasis in original)). "The mere fact that the COPN requirement

discouraged Plaintiffs from doing business in Virginia does not permit striking down an entire regulatory program – or any portion of it – as unconstitutional." *Colon Health Ctrs. II* at *6.

CHS relies heavily on *Walgreen*, but it is distinguishable from the present case on a number of grounds. In *Walgreen*, a retail pharmacy challenged the constitutionality of Puerto Rico's CON law, which required any retail pharmacy seeking to open or relocate within the Commonwealth to first obtain a CON. The court ruled that the CON Act, as applied to pharmacies, violated the dormant Commerce Clause by discriminating against interstate commerce.[6] Outmigration was not an issue, and there was no suggestion that any retail pharmaceutical services would be discontinued in the Commonwealth if pharmacies were exempted from CON requirements. The plaintiff did not seek to provide services to Puerto Rican residents outside the Commonwealth, but in it. By contrast, CHS's project would provide primary care services within York County, but would purposefully and in effect diminish or discontinue existing specialized services in the county. (R. pp. 95-99, FF 46-59; pp. 124-125, CL 46-47).

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[6] At least one court has criticized *Walgreen* for applying the discrimination test, rather than the undue burden test.

> I do not find the reasoning of *Walgreen* particularly persuasive. A local law which benefits a selected group of in-state and out-of-state companies to the detriment of all other competitors, by definition, does not "discriminate" on the basis of local versus out-of-state origin . . . . As a result, the undue burden test applies.

Florida Transportation Services, Inc. v. Miami-Dade County, 757 F.Supp.2d 1260, 1275 (S.D. Fla. 2010) (*"Fla. Trans. I"*), *aff'd Florida Transportation Services, Inc. v Miami-Dade County,* 703 F.3d 1230 (11th Cir. 2012) *("Fla. Trans. II").*

A number of other facts distinguish *Walgreen*. In 1979, when the Puerto Rican legislature amended the CON Act to add the requirement for pharmacies, it exempted existing pharmacies, 92 percent of which were Puerto Rican companies. *Walgreen* at 55. By 2001, local ownership had increased to 94 percent. *Id.* at 56. Opposition to CON applications came largely from locally owned pharmacies. Twenty-three percent of opposed applications were denied, but "virtually no" unopposed applications were denied. *Id.* Over 50 percent of out-of-Commonwealth applicants were required to undergo the entire CON administrative process, compared to less than 25 percent of local applicants. *Id.* Puerto Rico granted CONs to 90 percent of local applicants, but to only 58 percent of out-of-Commonwealth applicants. *Id.* Finally, the Puerto Rican law ***required*** denial of an application if the proposed location was in an area "saturated" with pharmacies. *Id.* The record in the present case contains no facts like these.

Moreover, adverse impact under South Carolina law and the ALC's application of that law is closely tied to the purposes of the CON Act: maintaining or increasing the quality of services, cost containment, avoiding unnecessary duplication, and meeting public needs. *See* S.C. Code Ann. § 44-7-120. In *Walgreen,* the Commonwealth failed even to offer any such justifications for its vague "saturation" regulation. Under these specific facts and circumstances the court concluded that the purpose of the Puerto Rican law was "simply to limit competition." *Id.* at 57.

None of the other cases CHS relies on are CON cases and none involve the provision of healthcare services, with the exception of *Colon Health Ctrs. I,* discussed *supra* at 23-24. Despite citing *Colon Health Ctrs. I,* CHS rejects its emphasis on an in-

state versus out-of-state benefit and burden analysis, instead arguing that the proper inquiry is local versus non-local. CHS Initial Brief at 27-28. The cases CHS cites in support of that proposition involve slaughterhouses (*Brimmer v. Rebman,* 138 U.S. 78 (1891)); milk processing (*Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); *H.P. Hood and Sons, Inc. v Du Mond*, 336 U.S. 525 (1949)); stevedore licenses (*Fla. Trans. Services II*); waste disposal (*C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. vs. Mich. Dept. of Natural Resources*, 504 U.S. 353 (1992)); and retail pharmacy services (*Walgreen*).

None of these cases, including *Walgreen,* involved a situation where, absent the challenged law, specialized healthcare services (or any services) would be reduced or discontinued within a county, forcing residents to travel out of the county to receive such services, to the particular disadvantage of medically underserved patients. *See* Am. Final Order at 23-24, FF 49-53; at 51-52, CL 46-47.

In *Dean Milk*, the court struck down a city ordinance requiring that all milk sold in Madison, Wisconsin be processed within five miles of the city. *Id.* at 350, 356. There was no suggestion that absent the ordinance, citizens of Madison would be unable to buy any milk locally. The Madison ordinance was struck down because, in practical effect, it excluded from sale in Madison milk "produced and pasteurized in Illinois." *Id.* at 297-98. Because the ordinance plainly discriminated against interstate commerce, it was immaterial whether it also discriminated against Wisconsin milk processors outside the Madison area. *Id.* at 298 n.4 and accompanying text.

In *Hood,* another milk case, the court struck down a state law regulating licenses for milk plants. Although the plaintiff met all criteria for a license, its

application was denied on grounds that issuance would "tend to a destructive competition." *Id.* at 660. Again, there was no evidence that granting the plaintiff a license would force locals to go elsewhere to buy milk.

Brimmer, a decision from 1891, involved a Norfolk, Virginia ordinance which essentially imposed a tax on the sale of meat from animals slaughtered over 100 miles from the city. *Id.* at 82. There was no evidence, however, that striking down the ordinance would mean residents of Norfolk would necessarily have to drive 100 miles to buy meat or else resign themselves to a vegetarian diet.

In *Fla. Trans. II*, 703 F.3d 1230, the court of appeals affirmed a district court decision invalidating (under the undue burden test) a county ordinance regulating stevedore permits. The Port Director who administered the permit program "did not abide by the ordinance," but instead, automatically renewed permits of existing permit holders – even those not providing services – and repeatedly denied permits to new applicants. *Id.* at 1236-37. The Port Director justified his decisions by superficial "needs assessments" that "did not address any of the other ordinance requirements, such as the applicant's competency, financial ability, or safety record." *Id.* at 1239 *(cf.* R. pp. 117-125) (evaluating both applicants on all relevant regulatory criteria). Again, there was no evidence or suggestion that invalidating the law would result in the loss or reduction of stevedore services for the Port of Miami.

The ordinance struck down in *Carbone,* like the statute struck down in *Fort Gratiot*, involved the processing of waste. CHS analogizes the processing of waste to the provision of services to hospital patients – an especially poor comparison. *See* CHS Initial Brief at 22. *Carbone*'s ordinance required local waste processing, while *Fort*

Gratiot's statute prohibited it. The invalidation of neither law resulted in waste going unprocessed or in citizens having to drive long distances to obtain waste processing services.

A review of all the cases cited by CHS to support its emphasis on local versus non-local businesses merely highlights that South Carolina's CON law is appropriately tailored to ensure access to medical services for all of the state's citizens. It does not "avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot* at 361. Rather than arbitrarily targeting the movement of goods or services across political boundaries, the South Carolina CON law - as written and as applied here - takes a balanced approach to ensure that medical services are distributed such that all citizens have the reasonable access that they need.

2. South Carolina CON laws, as written and as applied, serve a legitimate local purpose that could not be served as well by available nondiscriminatory means.

Even if a state law does discriminate against interstate commerce, it will be upheld against a dormant Commerce Clause challenge if it serves a legitimate local purpose that could not be served as well by available nondiscriminatory means. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

In *Maine v. Taylor*, a state law prohibited the importation of live baitfish. Despite finding that the statute discriminated against interstate commerce, the Supreme Court concluded it did not violate the dormant Commerce Clause. Deferring to factual findings by the district court, the Supreme Court ruled that the Maine statute was supported by a legitimate purpose: to protect native fisheries from parasitic infection

and adulteration by non-native species. *Id.* at 142-43, 151. Again relying on the lower court's fact findings, the Supreme Court held that the legitimate purposes behind the state law could not be served as well by available nondiscriminatory means. *Id.* at 143, 146-47, 151.

By contrast, the existence of nondiscriminatory alternatives played a substantial role in many of the cases cited by CHS. For example, the public health justification for the ban on milk processed outside a certain radius struck down in *Dean Milk* would have been better served by a law that simply made all milk subject to same local safety regulations. *Id.* at 354-55. Similarly, the *Fort Gratiot* Court struck down a flat ban on out-of-county waste, noting the availability of non-discriminatory alternatives such as imposing limits on amounts of waste, rather than on its geographic origin. *Fort Gratiot* at 367.

South Carolina CON laws, as written and as applied in this case, serve legitimate state purposes: cost containment, prevention of unnecessary duplication, meeting public needs, and quality control. S.C. Code Ann. § 44-7-120. Under the facts of this case, as determined by the ALC with the support of substantial evidence, those purposes could not have been served as well by other available means. Indeed, CHS does not suggest that any "nondiscriminatory" alternatives to the law exist that would adequately meet the stated purpose of the ALC's ruling: to ensure the continued provision of needed services within reach of all York County residents. Rather, CHS ignores this stated purpose and erroneously paints the ALC's ruling as simple economic protectionism.

B. The Undue Burden Test

As discussed above, South Carolina CON laws, as written and as applied in this case, do not discriminate against interstate commerce. Any effect on interstate commerce is incidental. As a result, the challenged order must be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* at 142. Rather than demonstrate any burden on interstate commerce, CHS has demonstrated that the ALC's ruling burdens only CHS, by denying its application in one particular instance. Such a limited "burden" on a single out-of-state entity cannot outweigh the significant benefit sought by the CON law and the ALC Order: protecting York County residents from the diminishment and elimination of accessible medical services.

In *Yakima*, the court granted summary judgment for defendants in an as-applied challenge to a state CON law requiring annual minimum volume for certain catheterization procedures. The court noted the special deference given state health and safety regulations. *Id.* at *5. The court also observed that the *Pike* test is not concerned with *actual* benefits, but "putative" ones. *Id.* at *11 n.6 (defining "putative" as "supposed" and noting that use of the word in *Pike* "further signals that courts are to give deference to the asserted benefits of states' public-safety laws"), *citing Nat'l Ass'n of Optoms.* at 8.

CHS cites only two undue burden cases in support of its argument: *Fla. Trans. II*, which has already been distinguished, and *Medigen of Kentucky, Inc. v. Public Service Commission of West Virginia*, 985 F.2d 164 (4th Cir. 1993). In *Medigen*, another waste case, a West Virginia law required transporters of infectious medical

waste to obtain certificates in order to haul it through the state. The law prohibited issuance of the certificates unless current service was inadequate. *Id.* at 166. Defendants conceded that the law imposed a significant burden on interstate commerce. *Id.* The court found that the goal of the law – "providing universal service at reasonable rates" – was reasonable, but that the law did not accomplish that goal. *Id.* at 167 ("Restricting market entry . . . necessarily ***limits*** the available service . . . and does nothing to insure that services are provided at reasonable prices") (emphasis in original). Striking down the law in *Medigen* did not diminish the waste transportation services in the state, since the law itself "limit[ed] the number of medical waste transporters from which a medical waste generator can seek service." *Id.*

In the present case, the putative local benefits include the perpetuation of high quality, specialized healthcare services within York County. In relation to these benefits, any incidental burden on interstate commerce cannot reasonably be viewed as "clearly excessive." In fact, CHS has not demonstrated that any burden on interstate commerce will result, only that one company – CHS itself – will not be allowed to refer all or nearly all patients requiring specialized services and covered by private insurance out of the county. *See Exxon* at 127 (holding that a court should focus on interstate commerce – not merely "the specific parties before it").

IV. The ALC Did Not Err in Approving Piedmont's Bed Transfer.

As discussed in relation to CHS's dormant Commerce Clause argument, Piedmont's proposal to transfer 36 of its existing, but unused, beds to FMMC was appropriate and fair. *See supra* at 16-17. CHS further argues that the ALC failed to consider or address State Health Plan criteria for Piedmont's bed transfer. CHS Initial

Brief at 29-30; (*See* R. p. 4016, 4017). CHS did not raise this issue (the ALC's failure to consider or address the criteria in its Final Order) at trial or in a post-trial motion. It is not, therefore, preserved for appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526, S.E.2d 716 (2000); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995).

In any event, the Plan transfer criteria do not apply to Piedmont's proposal, which is simply a transfer of beds between divisions of the same legal entity. (R. p. 361, lines 10-23). The Plan criteria apply to transfers between affiliated, but separate, legal entities, as evidenced by criterion 7, which requires a "written contract or agreement between the governing bodies of the affected facilities." Piedmont Medical Center and Fort Mill Medical Center are simply "d/b/a's" of Amisub of South Carolina, Inc., which has only one governing body. (R. p. 2203). Amisub cannot contract with itself.

Even if the Plan's transfer criteria were applicable, every individual criterion whose substance CHS raised at trial or in its post-trial motion was ruled on by the ALC. The eight criteria are listed below and discussed in turn.

1) A transfer or exchange of beds may be approved only if there is no overall increase in the number of beds.

CHS never raised the issue that Piedmont's transfer would increase the number of beds in the county, so it is not preserved for appeal. It is undisputed that a transfer would not increase the number of beds.

2) Such transfers may cross county lines; however the applicants must document with patient origin data the historical utilization of the receiving facility by residents of the county giving up beds.

CHS never raised this issue and the criterion is not applicable since Piedmont's transfer would not cross a county line.

3) Should the response to Criterion 2 fail to show a historical precedence of residents of the county transferring the beds utilizing the receiving facility, the applicants must document why it is in the best interest of these residents to transfer the beds to a facility with no historical affinity for them.

CHS never raised this issue and the criterion is not applicable since Piedmont's transfer would not cross a county line.

4) The applicants must explain the impact of transferring the beds on the health care delivery system of the county from which the beds are to be taken; any negative impacts must be detailed along with the perceived benefits of such an agreement.

This issue was raised by CHS and ruled on by the ALC. (R. p. 2152-2153; pp. 101-102, FF 67; p. 118, CL 18).

5) The facility receiving the beds must demonstrate the need for the additional capacity based on both historical and projected utilization patterns.

This issue was raised by CHS and ruled on by the ALC. (R. p. 118, CL 18).

6) The facility giving up the beds may not use the loss of these beds as justification for a subsequent request for the approval of additional beds.

CHS never raised the issue that Piedmont would use the transfer as justification for a future request for additional beds, so the issue is not preserved for appeal.

7) A written contract or agreement between the governing bodies of the affected facilities approving the transfer or exchange of beds must be included in the Certificate of Need application.

CHS never raised the issue that Piedmont has failed to enter into such a contract, so the issue is not preserved for appeal. Moreover, this criterion is not applicable to Piedmont's transfer because Piedmont Medical Center and FMMC are

merely two business names of the same legal entity, Amisub of South Carolina, Inc., which has one governing body and cannot contract with itself.

8) Each facility giving up beds must acknowledge in writing that this exchange is permanent; any further transfers would be subject to this same process.

CHS never raised the issue that Piedmont has failed to make such an acknowledgement, so the issue is not preserved for appeal.

V. The ALC's Application of South Carolina CON Law was Not Erroneous, Arbitrary, or Capricious.

A. The ALC Reviews Factual Issues De Novo and its Findings are Reviewed Under the Substantial Evidence Rule.

CHS repeatedly criticizes the ALC for making its own factual findings, rather than following DHEC's. *See, e.g.*, CHS Initial Brief at 35-36, 41-42, 45-49. It is well established that "courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Development Partners, II v. S.C. DHEC*, 441 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (quoting *S.C. Coastal Conservation League v. S.C. DHEC*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005)). It is equally well established that the ALC, when presiding over a contested case, reviews factual issues de novo. *Marlboro Park Hosp. v. S.C. DHEC,* 358, S.C. 573, 577, 579, 595 S.E.2d 851, 853, 854 (Ct. App. 2004), *citing Brown v. S.C. DHEC*, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). Factual findings by the ALC must be upheld if supported by substantial evidence. *Marlboro Park*, 358 S.C. at 577, 595 S.E.2d at 853.

B. The ALC Correctly Considered Adverse Impact, Accessibility, and Functional Balance.

1. Criterion 23(a) - Adverse Impact and Accessibility

As discussed *supra* at 13-14, Criterion 23(a) requires a balancing of CMC-FM's adverse impact against any increased accessibility it would bring. S.C. Code Regs. 61-15 § 802(23)(a). In this case, the ALC found that CMC-FM would ***decrease*** accessibility, by causing the reduction or elimination of specialty services in the county, by restricting access for medically underserved patients, and by designing and building a hospital too small to meet the growing demands of the county. (R. pp. 96-99, FF 47-60; p. 101, FF 65; p. 110, FF 99). CHS accuses the ALC of focusing "solely" on adverse impact, but here the adverse impact *is* decreased accessibility.

CHS points out that DHEC made different factual findings from the ALC, the most significant being DHEC's finding that CMC-FM would cause no adverse impact whatsoever. (R. p. 99, FF 60). CHS proposed to accomplish this by a massive shift of patients from its other facilities to CMC-FM. (R. p. 87-90, FF 28-26; p. 99, FF 60). The ALC rejected CHS's "shift" theory for a number of reasons:

> 1) "Even if CHS has no desire to serve new patients, which seems implausible, it would not have the ability to control patient admissions . . . ." (R. pp. 87-89, FF 29-32).
>
> 2) It would be "untenable" for CHS not to seek a return of its $75,000,000 projected investment of CMC-FM. (R. p. 89, FF 34).
>
> 3) CHS "has every incentive" to recoup its recent $300,000,000 investment in CMC-Pineville, which projected in its 2007 North Carolina CON application that 20 percent of its patients would come from York County. (R. p. 89, FF 33).

> 4) While CHS identified its incentive for establishing CMC-FM as the need to relieve utilization on its other facilities, "superior alternatives are available to CHS to decompress utilization," notably available excess capacity at several existing CHS facilities to which CHS could shift patients. (R. p. 90, FF 36).

2. Criterion 22 - Distribution and Functional Balance

CHS notes that the ALC further disagreed with DHEC's findings relative to Criterion 22 (Distribution). As discussed *supra* at 12-13, Criterion 22 provides:

> The existing distribution of the health service(s) should be identified and the effect of the proposed project upon that distribution should be carefully considered to functionally balance the distribution to the target population.

S.C. Code Regs 61-15 § 802(22). The ALC relied on the testimony and letters by independent York County physicians to find that approval of CMC-FM would reduce the quality of care and scope of services provided in York County. (R. p. 97-99, FF 54-57). From those facts the ALC concluded that approval of CMC-FM would adversely effect the distribution of services to the target population. (R. p. 121, CL 33).

As CHS notes, the ALC findings differ significantly from DHEC findings on the issue of distribution. As discussed above, DHEC accepted CHS's "shift" theory, which the ALC rejected as without support. (R. p. 87-90, FF 28-36; p. 99, FF 60).

The second major theory proposed by CHS relating to Criterion 22 was its "maldistribution" argument, accepted by DHEC, but rejected by the ALC. CHS's position was that, based on bed to population ratios, Piedmont's 100-bed hospital would "maldistribute" county beds by placing a disproportionate number in Northern York

County. (R. p. 101-102, FF 67, *citing* Tr. at 2659:23 – 2660:1) (R. p. 2013, line 23 – p. 2014, line 1).

DHEC accepted the maldistribution theory without reservation. The ALC found:

> Beverly Brandt, DHEC's CON Director at the time of the agency's decision, relied heavily on CHS' maldistribution model in presenting the grounds for her decision, stating that she was concerned with the effect of Piedmont's proposal on the "balance of the distribution [of beds] to the target population." Tr. 2663:20-2664:3. Her analysis of the applications used virtually the same language advanced by CHS in finding that "the replacement/relocation of the 36 beds in Northern York County does not appear to equitably distribute beds within the county and reduces accessibility to greater Rock Hill and Western York." Tr. 2662:12-16; Jt. Ex. 1-B at 1007.

(R. p. 102, FF 68).

The Court found three significant flaws with CHS's maldistribution model. First, CHS prepared the model before 2010 census data was published. Second, CHS failed to include in its population count a zip code (29707) that would be part of the new hospital's primary service area. (R. p. 102, FF 69). As a result, CHS understated the projected population for northern York County. (R. p. 102, FF 69). Third, the ALC found that the "more reasonable period for projecting the bed-to-population ratio would be in 2020, not 2015." (R. p. 102, FF 70). Updated 2020 population projections show that a 100-bed hospital "would result in an equitable distribution of beds and will better meet the need for a new hospital in the Fort Mill area." (R. p. 102, FF 70).

Finally, CHS argues that the ALC should have agreed with DHEC that a 100-bed hospital was unjustified because patients from zip codes 29730 and 29732 would not "drive past Piedmont to reach FMMC." CHS Initial Brief at 36; (*see* R. p. 105, FF 80). However, the ALC relied on Piedmont's transportation engineering expert Robert Walsh, who testified that, based on travel time studies he conducted, in many portions of the two zip codes "residents could travel to FMMC without having to drive past Piedmont." (R. p. 105, FF 80). Even for those portions of the zip codes for which the drive to Piedmont would be quicker, the time saved would be ten minutes or less. (R. p. 105, FF 80).

As support for its position CHS offers *Dept. of Health & Rehab. Servs. v Johnson & Johnson Home Heath Care,* 447 So.2d 361 (Fla. Dist. Ct. App. 1st Dist. 1984), in which the court invalidated a CON rule requiring home health agencies to serve a minimum number of patients. The court found the only purpose for the rule was "to protect the existing industry from competition." *Id.* at 362. The court found "no reasonable relationship . . . between the prohibition of the rule and the health, morals, safety or welfare of the public." *Id.* at 363. *Johnson & Johnson* is totally dissimilar to the present case, in which Judge Lenski made de novo factual findings, backed by substantial evidence, supporting his conclusions that approval of CMC-FM would decrease access to specialized healthcare services in York County, thereby adversely impacting the public.

3. The ALC's Reliance on Testimony of Joel Grice

CHS not only faults the ALC for disagreeing with Ms. Brandt's findings, it objects to the ALC's reliance on the testimony of Piedmont expert Joel Grice.[7] CHS implies that Mr. Grice's testimony is tainted because he, as DHEC's CON Director at the time, awarded the CON to Piedmont in 2006.[8] However, a trial judge is in the best position to evaluate the credibility of a witness, including that of experts. *Woodall v. Woodall,* 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); 32A C.J.S. *Evidence* § 727, at 82-83 (1996). The trier of fact may give an expert's testimony the weight he or she determines it deserves. *Florence County Dept. of Soc. Servs. v. Ward,* 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992). The trier of fact may accept the testimony of one expert over that of another. *See S.C. Cable Television Assn v. So. Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992).

A number of experts testified in this case. The Findings of Fact in the Amended Final Order rely most heavily on Piedmont health planning expert David Levitt. (*See* R. p. 82, 88, 91-95, 97-99, 101, 109-112). The second most referenced expert is CHS

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[7] CHS also criticizes the ALC for a reference to former DHEC reviewer Mary Fechtel in its March 31, 2013 order (the "Vacated Order"). The reference to Ms. Fechtel, who testified in the 2009 hearing but not in the hearing before Judge Lenski, was obviously a mistake, but is deleted from the Amended Final Order.

[8] Prior to the 2003 State Health Plan, the planning unit for acute care hospital bed need was the county. (R. p. 20). In the 2003 Plan, however, the planning unit was changed to the individual hospital(s) in a county. (R. p. 20). The 2004-05 Plan kept the hospital as the planning unit. As a result, the 64 additional bed-need identified for York County in the 2004-05 Plan was based on Piedmont's need. From this DHEC concluded that Piedmont was the only applicant that could be approved. (R. p. 11). Mr. Grice was not the "architect" of the Plan language, as CHS accuses. The Plan must be approved by DHEC's Health Planning Committee and Board. *See* S.C. Code Ann § 44-7-180. The ALC concluded the language was ambiguous and that DHEC's interpretation was erroneous because it applied the Plan in a manner that precluded competing applicants from being approved. (R. p. 99-100).

planner Dawn Carter. (See R. p. 87, 91, 92-95-96-102, 113). The Amended Final Order refers to Mr. Sullivan, Ms. Platt, and Mr. Grice approximately the same number of times, through none of them are referenced as many times as Ms. Brandt, who was not qualified as an expert.

The ALC relied on Mr. Grice's testimony as support for only three factual findings, none of them involving Criteria 22 or 23(a). *See* R. p. 110, FF 100) (financial projections); FF 101 (charges); p. 112, FF 108 (financial feasibility)). Finally, during the summation of the Conclusions of Law, Judge Lenski complimented all parties, stating "[t]o the extent that the court disagrees with certain aspects of Ms. Brandt's analysis, it was persuaded by the testimony of Mr. Grice, an expert with three decades of institutional knowledge and history with DHEC's CON program."[9] (R. p. 124, CL 43).

C. The ALC Relied on Relevant Findings in Analyzing Community Need.

1. Criteria 2(a-c)

As discussed *supra* at 14-17, the ALC concluded that Piedmont better met the Community Need criteria for two main reasons. First, the court concluded that Piedmont's 100-bed proposal, with the capacity to expand to 250 beds, would better

[9] In contrast to Mr. Grice's experience, when Ms. Brandt took charge of DHEC's CON program in 2008, she had never been involved in CON decision making and was only "on the periphery" of the CON process. (R. p. 1204, line 25 – p. 1205, line 6). At the time she took the job she had received no formal CON training, though she later attended "a couple of seminars and some on-line courses," as well as a half or full day of in-house training on health care reimbursement. (R. p. 1205, line 19 – p. 1206, line 5). Upon her appointment, Ms. Brandt admittedly had no "depth in health care management and finance" and at the time of trial had never been qualified as an expert. (R. p. 1207, line 13 – p. 1208, line 23).

meet the community need than CHS's much smaller proposal. (R. p. 118, CL 18). Second, the establishment of FMMC would strengthen the ability of existing providers to meet the healthcare needs of York County residents. (R. pp. 118, CL 19. (*See also* R. pp. 96-99, FF 47-60; p. 110, FF 99; pp. 119-120, CL 24-28; pp. 124-125, CL 46-47) (finding that approval of CMC-FM would result in the reduction or loss of quality, specialized healthcare services in the county, particularly affecting the medically underserved). CHS argues both reasons are irrelevant to a determination of community need.

The criteria must be construed in light of the purposes of the CON Act. The purposes of Criterion 2(a) (identification of the target population) and 2(b) (projected population changes) feed into the broader purpose of 2(c): "The proposed project should provide services that meet an identified (documented) need of the target population." *See* S.C. Code Regs. 61-15 § 802 (2a-c). These purposes clearly fall within the scope of the four purposes of the CON Act, especially that of "guid[ing] the establishment of health facilities and services which will best serve public needs." *See* S.C. Code Ann. § 44-7-120.

The ALC found that the larger Piedmont proposal "would be better positioned to meet the needs of the rapidly growing Fort Mill area than CMC-FM." (R. p. 118, CL 18). The ALC further found that "Piedmont demonstrated by a preponderance of the evidence that the establishment of FMMC" would further meet the healthcare needs of York County residents. (R. p. 118, CL 19). These findings are clearly relevant to any determination of community need, in light of "the requirements, goals, and

purposes of the CON Act, the State Health Plan, [and] the project review criteria." *See* S.C. Code Ann. § 44-7-210(B); S.C. Code Regs. 61-15 § 307(2).

2. Criterion 2(e)

Criterion 2(e) states that "projected utilization should be sufficient to justify . . . implementation of the proposed service." S.C. Code Regs. 61-15 § 802(2)(e). CHS argues that its project better met Criterion 2(e) because of its higher current market share than Piedmont. CHS Initial Brief at 41-42. The ALC found that CMC-FM's high projected utilization did not justify implementation of a 64-bed hospital with the capacity to add only another 18-20 beds. "CMC-FM's own projections show that, by the third year of operation, it would be operating at an occupancy level that would justify the approval of new beds, but with little shell space available to it for expansion." (R. p. 118, CL 18). In other words, the CHS proposal therefore is not sufficient because it is not adequate for the purpose. *See Webster's Unabridged Dictionary of the English Language* (Portland House 1989) (defining "sufficient" as "adequate for the purpose").

D. The ALC Relied on Relevant Findings in Concluding that CMC-FM Would Restrict Admissions for Medically Underserved Patients.

Criterion 3(d) provides: "The proposed facility should not restrict admissions. If any restrictions are applied, their nature should be clearly explained." S.C. Code Regs. 61-15 § 802(3)(d). The ALC concluded that Piedmont better met Criterion 3(d) because "CPN internal records suggest CPN practices in York County limit access for indigent, Medicaid, and even Medicare patients. Whereas Piedmont and the non-contractually bound physicians who have privileges there do not." (R. p. 119, CL 24).

CHS argues that the ALC's conclusion should be vacated because it focuses on CHS-employed physicians rather than CMC-FM. The ALC, however, found that:

> Because the CHS primary care practices are not accepting new Medicaid patients and have not accepted them for at least two years, York County Medicaid patients would not have access to CHS primary care physicians. Tr. 609:23-610:3. These Medicaid patients would also not be in a position to receive referrals to CHS specialty physicians who would be responsible for admitting patients to CMC-Fort Mill. Tr. 610:3-4. ***The CHS primary care physicians would function as the gatekeepers for CMC-Fort Mill.*** Tr. 610:4-6. ***If the flow of medically underserved patients into CHS primary care offices is restricted, the referrals and ultimate admissions of those individuals into CMC-Fort Mill would be restricted as well.***

(R. p. 110, FF 99) (emphasis added).

Next, CHS argues that the ALC's conclusion is based on telephone surveys that Judge Lenski described as "of limited probative value." (R. p. 719, lines 1-2). The ALC's conclusion, however, is not based on telephone surveys, but on "CPN internal records." (R. p. 119, CL 24; *see* R. p. 108-110, FF 93-94, 96-97).[10]

CHS argues that the ALC's conclusion regarding Criterion 3(d) is inconsistent with findings that CMC-FM would be unable to control emergency room admissions. However, the ALC specifically concluded that "the Findings of Fact reflect the court's

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[10] Other findings also support the ALC's conclusion. A much higher percentage of self-pay and charity patients from York County were served by Piedmont than CHS. (R. p. 110, FF 98). The previously referenced telephone surveys, while of limited value standing alone, were consistent with the CPN data relied on by the ALC. Finally, CHS grossly overestimated the charity care CMC-FM would provide, by ignoring relevant data, (R. p. 106, FF 85; p. 107, FF 90), and by reclassifying bad debt as charity care, contrary to the requirements of the State Health Plan. (R. pp. 106-107, FF 87-88, p. 120, CL 26-27).

concern that the practices of physicians affiliated with CHS via CPN would limit ***non-emergency*** access to CMC-FM." (R. p. 120, CL 28).

Finally, CHS argues that the ALC's conclusions with respect to Criteria 3(d) and 3(g) are inconsistent. The ALC concluded that both applicants equally met Criterion 3(g), which provides:

> The facility providing the proposed services should ***establish provisions*** to insure that individuals in need of treatment as determined by a physician have access to the appropriate service, regardless of ability to pay.

S.C. Code Regs. 61-15 § 802(3)(g) (emphasis added). All that is required by Criterion 3(g) is that provisions be established. By contrast, Criterion 3(d) requires that such provisions actually be implemented to ensure that admissions are not restricted. There is no inconsistency in the ALC's conclusions on these criteria.

E. <u>The ALC Appropriately Analyzed Criterion 16(c).</u>

As discussed *supra* at 10-12, Criterion 16(c) addresses a project's adverse impact on its own costs and charges and on the costs and charges of similar providers. S.C. Code Regs. 61-15 § 802(16)(c). No evidence was presented that CMC-FM would affect Piedmont's charges, although the ALC found that approval of CMC-FM would adversely impact Piedmont's costs. (R. p. 99, FF 58).

CHS argues that the ALC erred in not addressing the impact that either project would have on its own costs and charges, which CHS characterizes, without explanation, as "the primary factor." There was no evidence presented that CMC-FM would adversely impact CHS's costs or charges. The only evidence presented that Piedmont would adversely impact itself was rejected by the ALC: "Ms. Brandt

disagreed with Piedmont's strategy, opining that FMMC would actually harm Piedmont, while CMC-FM would not. Jt. Ex. 1-B at 1011. The court finds no support for Ms. Brandt's position." (R. p. 99, FF 60). The ALC also found that both applicants' proposed costs were "reasonable" and their costs and charges comparable to those of similar facilities. (R. p. 110-112, FF 101, 103-05; p. 123, FF 38).

F. The ALC Appropriately Analyzed Criterion 6(b).

Criterion 6(b) provides:

> The projected levels of utilization should be consistent with those experienced by similar facilities in the service area and/or state. In addition, projected levels of utilization should be consistent with the need level of the target population.

S.C. Code Regs. 61-15 § 802(6)(b).

CHS argues that the ALC erred in concluding that Piedmont better met Criterion 6(b) than CHS. CHS Initial Brief at 47. In fact, the ALC concluded that "both Piedmont and CHS ***equally meet*** . . . Criterion 6b." (R. p. 123, CL 39) (emphasis added).

CHS asserts a "more is better" approach to Criterion 6(b). In CHS's view, the higher the utilization, the better a project complies with the criterion. *See* CHS Initial Brief at 47-48. CHS's view is not supported, however, by the language of the criterion: "projected levels of utilization should be ***consistent with the need level of the target population.***" S.C. Code Regs. 61-15 § 802(6)(b) (emphasis added). The ALC found that, due to its limited size, CMC-FM's projected occupancy rate (70 percent by only its third year of operation) could force the facility to expand. For this reason, CMC-FM's projected utilization was not consistent with the need level of the

population, whereas FMMC's larger size "places it in a better position to accommodate the expanding population of fast growing Northern York County." (R. p. 123, CL 39). Nevertheless, the ALC found both applicants equally satisfied the criterion.

G. The ALC Appropriately Analyzed Criterion 17.

As discussed *supra* at 18, Criterion 17 provides: "The proposed project should improve efficiency by avoiding duplication of services, promoting shared services and fostering economies of scale or size." S.C. Code Regs. 61-15 § 802(17). The ALC concluded that Piedmont better satisfied Criterion 17 "because its proposal fosters economies of scale by spreading costs over a greater number of beds. Not only will FMMC's 100 beds better accommodate future growth, FMMC is better designed for expansion than is CMC-FM." (R. p. 123, CL 41).

CHS disputes the ALC's conclusion for several reasons. First, it notes that FMMC will have "more empty beds" and "fewer patients" than CMC-FM. CHS Initial Brief at 49. FMMC will have more empty beds because it will have a larger facility. "A seventy (70) percent occupancy rate is an indicator that expansion may be needed, especially in a smaller hospital." (R. p. 103, FF 73). The ALC found that under CHS's utilization model, occupancy at CMC-FM by 2020 would exceed 96 percent. (R. p. 101, FF 63). CMC-FM, however, was designed for only minimal expansion. (R. p. 101, FF 65; p. 113, FF 110; p. 118, CL 18).

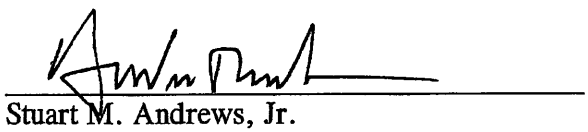
CHS next argues that Piedmont's project is less efficient because it is more expensive than CHS's. CHS Initial Brief at 49. Criterion 17 speaks to economies of scale, however, and the costs per bed of the two projects are the same. (R. p. 111, FF 103).

Finally, CHS argues that FMMC is less efficient because it is "sponsored by an applicant with an eroding patient base." CHS Initial Brief at 49. The ALC found, however, that FMMC was the key to restoring Piedmont's eroded patient base. R. P. 99, FF 59-60; p. 103-105, FF 74-81; *see also* R. p. 113, FF 111-112) (additional factual findings on the relative efficiency of the two projects).

CONCLUSION

For the reasons set forth above, Piedmont respectfully requests that this Court affirm the Amended Final Order of the Administrative Law Court.

NELSON MULLINS RILEY & SCARBOROUGH LLP



Stuart M. Andrews, Jr.
SC Bar No. 000400
E-Mail: stuart.andrews@nelsonmullins.com
Daniel J. Westbrook
SC Bar No. 012939
E-Mail: dan.westbrook@nelsonmullins.com
Susannah Knox
SC Bar No. 100954
E-Mail: susannah.knox@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Respondent, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center

Columbia, South Carolina

Aug. 3, 2015

BKT 110 ; PLDI 1

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 2011-ALJ-07-0575-CC
Appellate Case No. 2015-000056

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is ..... Appellant.

BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Attorneys for Respondent South Carolina Department of Health and Environmental Control

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STATEMENT OF ISSUES[1]

Does the Administrative Law Court's ("ALC") application of the Certificate of Need ("CON") Act, South Carolina Health Plan, and project review criteria survive a dormant Commerce Clause challenge, where (a) it does not discriminate against interstate commerce, and (b) it does not impose a burden on interstate commerce?

ARGUMENT

The Commerce Clause expressly grants to Congress the power to "regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. Courts have consistently held that this express grant of power contains negative implications that prohibit unjustified State actions which discriminate against or unduly burden interstate commerce. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). The principle is grounded in the belief that "[t]he mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States" and it prohibits states from "enact[ing] laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." *Granholm v. Heald,* 544 U.S. 460, 472 (2005). However, the dormant Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. 131, 151 (1986). A State still "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Id.*

Analysis of a dormant Commerce Clause claim involves two tiers, depending on the type of allegation involved. The first tier applies "where a state law discriminates facially, in its practical effect, or in its purpose" against interstate commerce. *Envtl. Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir.1996). Under the first tier

[1] The Department takes no position on the remaining issues raised in Appellant's brief.

review, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotations omitted).

The second tier of dormant Commerce Clause analysis is commonly called the *Pike* test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The *Pike* analysis requires courts to consider "whether the state laws unjustifiably ... burden the interstate flow of articles of commerce." *Brown v. Hovatter,* 561 F.3d 357, 363 (4th Cir. 2009) (internal quotation marks omitted). In this second tier analysis, the regulatory measure at issue "will be upheld unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.

"The burden to show discrimination rests on the party challenging the validity of the statute[.]" *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The party claiming discrimination has the burden to put on evidence of a discriminatory effect on interstate commerce that is "significantly probative, not merely colorable." *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 40 (1st Cir. 2005) (internal quotation marks omitted). The claimant must demonstrate that the challenged statute, "if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001).

I. The ALC's Application of the CON Law Does Not Discriminate Against Interstate Commerce.

Under the dormant Commerce Clause, a state law that discriminates against interstate commerce on its face, or in its practical effect or purpose, "is virtually per se invalid," "[u]nless discrimination is demonstrably justified by a factor unrelated to

economic protectionism." *McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012) (internal quotations omitted). A statute discriminates against interstate commerce when it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm*, 544 U.S. at 472 (internal quotations omitted). A law is not discriminatory when it treats companies exactly the same. *United Haulers Ass'n, Inc.*, 550 U.S. at 342

Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") does not argue that the CON laws are facially discriminatory. Carolinas contends, however, the ALC applied the CON laws to purposefully and effectively discriminate against out-off-state competitors in order to protect an in-state provider of healthcare services.

The purposes of the CON Act are to promote cost containment, prevent unnecessarily duplication of health care facilities and services, guide the establishment of health care facilities and services which will best serve public needs, and ensure that high quality services are provided in health care facilities in the State. S.C. Code Ann. § 44-7-120. To serve these purposes, the CON Act requires a person to obtain a CON from the Department prior to constructing or otherwise establishing a new health care facility. *Id.*; *see also* S.C. Code Ann. § 44-7-160(1). In the case of competing applications, the Department must award a CON, if appropriate, on the basis of which, if any, most fully complies with the requirements, goals, and purposes of the CON Act, the South Carolina Health Plan, and applicable project review criteria. S.C. Code Ann. § 44-7-210(B).

The ALC determined that overall, Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center's ("Piedmont")

application more fully complies with the purposes of CON, the South Carolina Health Plan, and project review criteria. As noted in the Amended Final Order and Decision, the ALC concluded that construction of a 100 bed hospital in Fort Mill utilizing the 64 bed need indicated in the South Carolina Health Plan and redeploying 36 beds from Piedmont's Rock Hill facility, in addition to Piedmont's capacity to expand to 250 beds at its proposed Fort Mill facility in the future, demonstrated "that it would be better positioned to meet the needs of the rapidly growing Fort Mill area" than Carolinas' proposed 64-bed facility, which "would be too small to fully meet the demand." (R. p. 118). The ALC also concluded Carolinas' "practices in York County limit access for indigent, Medicaid, and even Medicare patients," and Piedmont therefore better met the project review criterion providing that a proposed facility should not restrict admissions. (R. p. 119). The ALC found the "practices of physicians affiliated with CHS via CPN would limit non-emergency access to" Carolinas' proposed facility and concluded Piedmont's application better met the project review criterion regarding availability of care for indigent residents in the county. (R. p. 120).

The ALC cited numerous letters from physicians and testimony of three physicians at trial to support its conclusion that "the ability of existing York County healthcare providers to serve residents of the county would be jeopardized by the operation of" Carolinas' proposed project; as such, the ALC concluded Piedmont's project would better functionally balance the distribution of health services to the York County population, another project review criterion. (R. p. 121). Considering adverse impact, the ALC cited multiple evidence in the record to support its finding that Carolinas' project did not meet the project review criterion requiring consideration of the

project's impact on the current and projected occupancy rates at existing facilities or services. (R. pp. 121-122). Finally, the ALC concluded Piedmont's project to be better designed for expansion than Carolinas' project, thereby better meeting the project review criterion regarding fostering economies of scale. (R. p. 123).

Such findings and conclusions by the ALC demonstrate the ALC's application of the CON laws and its purpose in choosing Piedmont's application over Carolinas' application was grounded in multiple non-discriminatory criteria. The ALC's decision therefore withstands scrutiny under the discrimination tier analysis.

II. The ALC's Application of the CON Law Does Not Burden Interstate Commerce.

If there is no discrimination against interstate commerce, courts will examine whether state laws "unjustifiably ... burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994). If a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

The dormant Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (internal quotations omitted). Thus, a statute does not discriminate against interstate commerce merely because it adversely affects the ability of some out-of-state entities to compete. *Id.* at 133 ("For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."). Rather, the

test is whether the effect of the statute is to "benefit in-state economic interests by burdening out-of-state competitors." *Kentucky Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (internal quotations omitted).

The dormant Commerce Clause "does not, of course, invalidate all restrictions on commerce." *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 669 (1981). "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Id.* (internal quotations and citations omitted).

Applying the *Pike* balancing test, any burden on interstate commerce must be weighed against the State's fundamental power to regulate to protect public health, safety, and welfare. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960) ("In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, *** never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.").

The purposes of the CON Act, as noted above, include ensuring that high quality services are provided in health care facilities in the State and guiding the distribution of health care facilities and services to best serve public needs. *See* S.C. Code Ann. § 44-7-120. The standards set forth for establishing new hospitals in the South Carolina Health Plan and the applicable project review criteria are aimed at meeting these purposes. As

discussed above, the ALC applied the CON laws in this matter to achieve the statutory purposes.

The standards and project review criteria apply equally to in-state CON applicants and out-of-state CON applicants. There is no special barrier to out-of-state CON applicants for a new hospital in York County. Any incidental burden on commerce resulting from application of the CON requirements applies equally to resident and nonresident applicants, and therefore does not burden interstate commerce. *See Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (Remanding appellant's challenge to Virginia's CON laws to the district court to apply the Pike balancing test and instructing that "[t]he fulcrum of this inquiry will be whether the certificate requirement erects a special barrier to market entry by non-domestic entities. As noted, the district court should not confine its focus to the effect on appellants alone, but should instead survey the burden imposed on interstate commerce generally."). *See also Yakima Valley Memorial Hospital v. Washington Department of Health*, 731 F.3d 843 (9th Cir. 2013) (applying the reasoning from *Exxon Corp.* to hold that Washington's Certificate of Need law, imposing non-discriminatory qualifications for approval of a hospital's elective percutaneous coronary interventions (PCI) program, did not burden interstate commerce).

The ALC's application of the CON laws does not have a discriminatory effect on interstate commerce, and any burden on interstate commerce does not outweigh its putative local benefits. It therefore survives scrutiny under the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, the ALC's decision does not violate the dormant Commerce Clause. The Department takes no position on Appellant's remaining issues on appeal.

Respectfully submitted,

Ashley C. Biggers, Esquire (SC Bar No.: 17225)
Vito M. Wicevic, Esquire (SC Bar No.: 100265)
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367

July 31, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Docket No. 2011-ALJ-07-0575-CC
Appellate Case No. 2015-000056

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Respondent South Carolina Department of Health and Environmental Control complies with Rule 211(b), SCACR, and the South Carolina Supreme Court Order of April 15, 2014.

Ashley C. Biggers, Esquire
Vito M. Wicevic, Esquire
South Carolina Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29078
P: (803) 898-3350
F: (803) 898-3367

Attorneys for Respondent South Carolina Department of Health and Environmental Control

August 3, 2015

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

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v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ..... Respondents,

Of Whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is..... Appellant.

PROOF OF SERVICE

I, Jaimie Presley Jones, with the South Carolina Department of Health and Environmental Control, do hereby certify that I have on this **3rd day of August, 2015**, served a copy of the ***BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND CERTIFICATE OF COUNSEL*** upon all parties and counsel of record in the above-captioned case, via Electronic Mail and United States Mail, First Class, postage prepaid, addressed as follows:

Parties of Record

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211
Email: dan.westbrook@nelsonmullins.com
Email: stuart.andrews@nelsonmullins.com

Attorneys for Amisub of SC, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
P.O. Box 22828
Charleston, SC 29413
Email: dougmuller@mvalaw.com
Email: trudyrobertson@mvalaw.com
Email: brandongaskins@mvalaw.com

Attorneys for The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center --Fort Mill

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

By: Jaimie Presley Jones
Jaimie Presley Jones

Date: August 3, 2015

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center .....Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

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Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") submits this reply to the Initial Brief of Respondent Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont").[1]

ARGUMENT

I. THE ALC'S APPLICATION OF THE CON LAWS VIOLATES THE DORMANT COMMERCE CLAUSE.

A. The ALC's application of the CON laws violates the dormant Commerce Clause under the discrimination tier.

Despite Piedmont's claims to the contrary, the discrimination tier of the dormant Commerce Clause analysis applies in this case because the ALC's ruling has both a discriminatory purpose and effect. The discriminatory purpose and effect of the ALC's decision is clear based on its admitted goal of reducing the outmigration of York County residents seeking healthcare in North Carolina. (R. pp. 124-125). The ALC seeks to reduce interstate commerce by ensuring that York County residents receive healthcare services in York County, South Carolina, from Piedmont rather than from out-of-state providers in Charlotte, North Carolina. Thus, the express purpose and practical effect of the ALC's decision is to erect a barrier that makes it more difficult for an out-of-state entity, Carolinas, to provide hospital services to York County residents and reduce the flow of consumers traveling out-of-state to receive healthcare. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (stating that dormant Commerce Clause invalidates local laws that impose commercial barriers or discriminate against an article of commerce based on its origin or destination out of state).

[1] Capitalized terms and abbreviations used and not otherwise defined herein shall have the respective meanings set forth in Carolinas' Initial Brief.

The ALC's impermissible, protectionist motivation is evident throughout the Amended Final Order. The ALC made several findings regarding the purported negative impact that competition from North Carolina hospitals, including Carolinas, has had on Piedmont over the last decade and the speculative negative impact that competition from CMC-FM will have on Piedmont in the future. (R. pp. 94-97). The ALC relied on these findings to award several Criteria in Piedmont's favor based on alleged lost profits and increased costs Piedmont will incur because of competition from CMC-FM. (R. pp. 121-122). The ALC's application of the Criteria to favor Piedmont is discriminatory and protectionist because it seeks to protect Piedmont from the adverse effects of competition from an out-of-state competitor.

Piedmont argues that there is no discriminatory purpose and effect in the ALC's adverse impact analysis because the Criteria, as applied by the ALC, affect in-state and out-of-state and local and non-local entities the same. That proposition is not true. Under the ALC's application, the existing in-state or local hospital will always begin the CON review process with an inherent advantage over an out-of-state or non-local competitor attempting to enter the local market because the ALC's analysis examines a proposed hospital's impact on only the existing in-state or local hospital's operations and finances. Thus, the ALC applied the Criteria in a manner designed to benefit in-state economic interests to the detriment of out-of-state or non-local competitors, which is the very definition of economic protectionism. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994) (defining "economic protectionism" as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

The ALC's application of the Criteria and CON Act also discriminates against interstate commerce because it punishes Carolinas based on the expectation that Carolinas would engage in future interstate commerce by referring CMC-FM patients to affiliated facilities in North Carolina for specialized care. Conversely, the ALC rewards Piedmont for engaging in intrastate commerce based on the expectation that it would refer FMMC patients to the Piedmont hospital in Rock Hill for specialized services rather than to North Carolina hospitals. This application of the law which punishes interstate commerce and rewards intrastate commerce is discriminatory because it serves as a disincentive for hospitals and other healthcare providers from engaging in interstate commerce in their referral patterns. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 341 (1989).

Piedmont's attempt to distinguish the authorities cited in Carolinas' Initial Brief is similarly unpersuasive. For example, in its effort to distinguish *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), Piedmont argues that *Walgreen* is distinguishable because "[o]utmigration was not an issue" in that case. But it is precisely because the ALC attempts to curb outmigration in this case that its application of the CON laws and regulations is discriminatory. The ALC's express purpose is to prevent and reverse the outmigration of York County residents seeking healthcare in North Carolina, which is *per se* discrimination against interstate commerce. This case presents better grounds for a finding of impermissible discrimination under the dormant Commerce Clause than those involved in *Walgreen.*

Piedmont also fails to demonstrate that the local versus non-local framework established under dormant Commerce Clause jurisprudence does not apply in this case.

Piedmont contends that the authorities cited by Carolinas in support of the local versus non-local framework are distinguishable because those cases do not involve the provision of healthcare services. There is nothing in the United States Constitution or existing legal precedent, however, that exempts healthcare providers from the strictures of the dormant Commerce Clause or suggests that the applicability of the dormant Commerce Clause analysis, including the local versus non-local framework, depends on the type of business involved in the case. In fact, just the opposite is true as the United States Supreme Court has stated that "a state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949); *see also Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (declaring that the state's "unquestioned power to protect the health and safety of its people" does not permit it to erect an economic barrier protecting local industry against out-of-state competition). While the State of South Carolina necessarily has authority to regulate the provision of healthcare services, that authority does not permit it to discriminate against out-of-state service providers.

B. Piedmont fails to prove under strict scrutiny that the ALC's application of the CON laws serves a legitimate local purpose that could not be served as well by available nondiscriminatory means.

1. Piedmont fails to identify a legitimate local purpose served by the ALC's application of the CON laws.

Although Piedmont correctly states that under *Maine v. Taylor*, 477 U.S. 131, 138 (1986), a discriminatory application of state law may be upheld against a dormant Commerce Clause challenge if it serves a legitimate local purpose that could not be served as well by available nondiscriminatory means, the ALC's application of the

Criteria and CON law does not advance a legitimate local purpose under the applicable strict scrutiny analysis.

As the Supreme Court states in *Taylor*, "Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity.'" *Id.*at 148 (citations omitted). Recognizing the insidious nature of discriminatory statutory and regulatory schemes, the United States Supreme Court has held that the standards for justifying a discriminatory law based on a legitimate local purpose are high and subject to the strictest scrutiny. *See Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("Facial discrimination by itself may be a fatal defect" and "at a minimum . . . invokes the strictest scrutiny"); *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) ("Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonably nondiscriminatory alternatives. . . . However it be put, the standards for such justification are high."). "[W]hen considering the purpose of a challenged statute, [a court] is not bound by 'the name, description or characterization given it by the legislature of courts of the State,' but will determine for itself the practical impact of the law." *Hughes*, 441 U.S. at 336 (1979) (citations omitted).

In this case, the ALC's findings of fact and conclusions of law show no legitimate local purpose is served by its application of the Criteria and CON Act. Rather, these findings and conclusions demonstrate that the ALC's motivating concern was Piedmont's competitiveness in the York County healthcare market. The ALC's decision is replete

with examples revealing that it sought to protect and reverse effects on Piedmont's business from competition from Charlotte-based healthcare systems. (*See, e.g.,* R. pp. 84-99, 121-122, 124-125). By seeking to protect Piedmont from competition, the ALC has engaged in "simple economic protectionism," which does not serve a legitimate local purpose.

Piedmont ignores the ALC's explicit anti-competitive motivation and instead claims that the "legitimate" local purpose of the ALC's ruling is "to ensure the continued provision of needed services within reach of all York County residents."[2] This purpose, however, is not stated in the ALC's decision; nor can it be inferred. The purpose of the ALC's ruling is not "to ensure the continued provision of needed services within reach of all York County residents," as Piedmont posits. Instead, the purpose of the ALC's ruling is to ensure that York County residents will have access to and obtain healthcare services from one in-state or in-county provider, Piedmont, rather than from other providers in the Charlotte area. (*See, e.g.,* Am. Final Order, Conclusions of Law ¶ 45 ("This Court concludes that the establishment of FMMC will best serve the needs by reducing the outmigration of York County residents to hospitals beyond York County.") (R. p. 124)). This is not a legitimate purpose under the dormant Commerce Clause, which prohibits a state from applying a licensing scheme in a discriminatory way for the purpose of influencing citizens to obtain goods and services in-state rather than out-of-state.

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[2] In connection with making this assertion, Piedmont repeatedly states that CMC-FM, if approved, would not provide specialized, tertiary services in York County. (Piedmont's Initial Brief, pp. 8, 19.) A close examination of the mere seven lines of trial testimony (R. p. 1322, lines 9-12, p. 1324, lines 1-4) that Piedmont cites to support this claim, however, reveals that Piedmont's characterization of this evidence is misleading. That testimony actually shows that CMC-FM is intended to provide 75% of all care that is provided in a hospital. Carolinas would provide an overwhelming majority of all hospital care at CMC-FM, and neither the ALC nor Piedmont has identified what services Piedmont provides that would not be available at CMC-FM or what services of those Piedmont would discontinue if CMC-FM is approved.

Nothing in the ALC's ruling supports the conclusion that York County residents will not have reasonable access to needed healthcare services from North Carolina-based providers. There is no evidence that healthcare provided by out-of-state healthcare systems, such as Carolinas, is of lower quality than that offered by Piedmont. *See Limbach*, 486 U.S. at 279 (rejecting argument that discriminatory ethanol subsidy advanced legitimate health goals because there was no evidence that out-of-state ethanol was less healthy than in-state ethanol). In fact, the substantial evidence presented by Piedmont's witnesses and experts, and adopted by the ALC, demonstrates that York County residents currently have ready access to complex and specialized healthcare services from Charlotte-based providers based on overwhelming statistics showing that York County residents voluntarily prefer to receive such services from Carolinas and other Charlotte-based providers than from Piedmont. (R. pp. 85-86, 88-89, 94-96). As York County residents would continue to have access to quality specialized and complex healthcare services in Charlotte if Carolinas is awarded the Fort Mill CON, the ALC's application of the Criteria and CON Act do not serve the legitimate purpose of ensuring access to needed healthcare services.

The fundamental flaw in Piedmont's argument regarding legitimate local purpose is that Piedmont fails to explain why it is legitimate to use discriminatory means to ensure that specialized and complex healthcare services are maintained by Piedmont in York County when York County residents already use and have ready access to the same services in Charlotte. There is a complete lack of evidence in the record that the marginal increase in geographic difference to Charlotte will jeopardize the health and safety of any York County residents or will reduce their access to specialized and complex healthcare

services. In fact, the evidence that York County residents voluntarily choose to leave the county for healthcare, especially complex and specialized services, demonstrates that any reduced access to certain services at Piedmont in the event that CMC-FM is established would not result in any deprivation of access.

Piedmont's claim that a legitimate local purpose is served by ensuring that Piedmont can continue to provide specialized and complex services to patients in York County is also inconsistent with the 2004-05 State Health Plan, which provides:

> Any services area may cross multiple administrative, geographic, trade and/or political boundaries. It is recognized that due to factors which may include availability, accessibility, personal or physician preferences, insurances and managed care contracts or coverage, or other reimbursement issues, patients may seek and receive treatment outside the county or inventory region in which they reside and/or outside of the state. Therefore, service areas may specifically cross inventory regions and/or state boundaries.

(R. p. 3057). This provision is significant because it recognizes that healthcare markets cannot be artificially cabined by arbitrary lines on a map, as Piedmont attempts to do.

When analyzed within the context of the economic realities of the healthcare market for York County residents, it becomes clear that the only purpose served by the ALC's discriminatory application of the Criteria is to protect Piedmont's bottom line against competition from a Charlotte-based hospital system. York County residents have had access to high quality, specialized, and complex healthcare services in Charlotte for years, and that access will continue even if Piedmont discontinues certain healthcare services. Therefore, Piedmont's argument in support of a legitimate local purpose cannot survive the strict scrutiny under which it must be analyzed, and the Court should reject this argument accordingly.

2. *The purported legitimate local purpose of the ALC's application of the CON laws is not supported by concrete evidence, and therefore, cannot survive a strict scrutiny analysis.*

Even if the Court recognizes that maintaining needed healthcare services in York County is a legitimate local purpose, the ALC's ruling fails to demonstrate that such purpose is supported by sufficient evidence under the strict scrutiny analysis. As stated above, a claim that a discriminatory application of the law is justified by a legitimate local purpose is subject to the strictest scrutiny. This strict scrutiny analysis demands more than "mere speculation" to support discrimination against out-of-state goods and services. *Granholm v. Heald*, 544 U.S. 460, 492 (2005). Rather, this analysis requires "concrete record evidence" to justify the discriminatory purpose and effect. *Id.* at 493.

In this case, Piedmont presented no concrete evidence that Piedmont will discontinue specialized or complex services if Carolinas is granted the Fort Mill CON. Contrary to Piedmont's representations, the ALC did not make any definitive findings that Piedmont would discontinue any specialized or complex healthcare services if CMC-FM is established.[3] Rather, the ALC found merely that Piedmont's specialty programs would be "jeopardized" by the operation of CMC-FM. (R. p. 96-97). A generalized statement that some specialty programs would be jeopardized falls well short of the concrete evidence needed to justify the discriminatory application of the Criteria in this case. To justify the legitimate local purpose, as argued by Piedmont, the ALC was required under a strict scrutiny analysis to make specific findings about which specific

[3] Although Piedmont claims that the operation of CMC-FM would decrease access to services for medically underserved York County residents, the ALC, despite Carolinas' request in its Motion for Reconsideration, failed to make any findings regarding which party best meets Criterion 3(h), which addresses the "[p]otential negative impact of the proposed project upon the ability and/or resources of existing providers to serve medically underserved groups must be considered." S.C. Regs. 61-15 § 802.3(h).

programs and services would be discontinued based on the specific findings of when such programs and services would fall below minimum thresholds necessary to maintain those programs and services. Those findings, supported by concrete evidence, are completely lacking from the ALC's decision.

Instead of being supported by concrete evidence, the ALC's generalized finding that Piedmont's specialty programs would be jeopardized is based on speculative testimony of Piedmont's witnesses. Those witnesses could not state with any certainty that Piedmont would discontinue any specific programs and services if Carolinas is awarded the Fort Mill CON. (R. p. 915, line 7-p. 916, line 1, p. 1017, line 24-p. 1018, line 25, p. 1165, lines 5-19, p. 2096, line 25-p. 2097, line 4). Moreover, there are specific programs and services that Piedmont cannot discontinue under its contract with York County. (R. p. 936, line 5-p. 937, line 9, p. 951, line 21-p. 952, line 17). Accordingly, Piedmont's claim that "certain local services would be significantly reduced or eliminated" is not supported by the concrete evidence needed to justify the ALC's discrimination under a strict scrutiny analysis. *See Granholm*, 544 U.S. at 490-93 (rejecting state's defense of discriminatory law under the dormant Commerce Clause because its claims of legitimate local purpose and lack of nondiscriminatory alternative were not supported by "concrete evidence").

3. The ALC failed to consider reasonable nondiscriminatory alternatives to its discriminatory application of the CON laws.

Piedmont also fails to present concrete evidence that the purported legitimate local purpose cannot be adequately served by reasonable nondiscriminatory alternatives. Rather than engage in any discussion about why certain nondiscriminatory alternatives are unreasonable or not available, Piedmont asserts in conclusory fashion and without

analysis that no alternatives exist that would adequately meet the alleged purpose of the ALC's ruling and even suggests that Carolinas is required to demonstrate the availability of nondiscriminatory alternatives.

Piedmont's argument fails for two reasons. First, Carolinas does not carry the burden of proving that nondiscriminatory alternatives exist. As the United States Supreme Court explained in *Hughes*, 441 U.S. at 336, and reiterated in *Taylor*, 477 U.S. at 138, once a state law is shown to be discriminatory either on its face or in practical effect, the burden falls on the state to demonstrate that the challenged application of the law serves a legitimate local purpose that cannot be served as well by available nondiscriminatory means. Thus, the ALC was required to demonstrate that nondiscriminatory alternatives do not exist.

Carolinas made this argument in its Motion for Reconsideration, and the ALC disregarded it. Instead, the ALC concluded in a footnote that it did not believe that its application of the applicable laws and regulations violated the dormant Commerce Clause without conducting any analysis under the applicable legal framework, including analyzing whether nondiscriminatory alternatives existed. As a result, the ALC erred in conducting the dormant Commerce Clause analysis.

Second, Piedmont's argument fails because it offered no evidence regarding the unavailability of nondiscriminatory alternatives. Ironically, Piedmont does offer alternatives in how mitigation can be achieved if Carolinas is awarded the Fort Mill CON. Piedmont proposes that Carolinas should agree to provide specialty and tertiary services or that Carolinas should enter into a contract with York County similar to Piedmont's contract with York County. (Piedmont's Initial Brief, p. 20.) Certainly,

DHEC has the ability to condition the issuance of a certificate of need, if warranted, under S.C. Code Ann. §§ 44-7-210 and 44-1-60(D). *See* S.C. Code Ann. § 44-7-210 (stating that DHEC staff shall issue a decision on a certificate of need application in accordance with § 44-1-60(D)); § 44-1-60(D) (providing that DHEC staff may "issue, deny or *condition*" a certificate of need) (emphasis added). *See also* S.C. Regs. 61-15 § 311 ("Implementation of the project or operation of the facility or medical equipment that is not in accordance with the Certificate of Need application or *conditions* subsequently agreed to by the applicant and the Department may be considered a violation of this Regulation") and S.C. Regs. 61-15 § 607(5) (providing that undertaking a project that is not in accordance with the "approved application or *conditions* or amendments subsequently agreed to by the applicant and the Department may be consideration a violation of this article") (emphasis added). Accordingly, it follows that the state has the authority to condition the issuance of the Fort Mill CON to Carolinas by requiring certain measures to serve the purported legitimate local purpose that Piedmont advances in its Initial Brief without discriminating against Carolinas through the application of the Criteria. As a result, Piedmont's argument that such nondiscriminatory conditions are unavailable is incorrect and cannot survive a strict scrutiny analysis.

C. The ALC's application of the CON laws violates the dormant Commerce Clause under the undue burden tier.

Piedmont erroneously argues under the dormant Commerce Clause's "undue burden" tier that any burden on interstate commerce is merely incidental because "the ALC's ruling burdens only" Carolinas. This argument is overly simplistic and ignores that the ALC's ruling is intended to affect not only Carolinas but also thousands of York County residents who engage in interstate commerce by obtaining healthcare services in

North Carolina. The express purpose and practical effect of the ALC's application of the law is to keep these patients from leaving York County to obtain healthcare services. Accordingly, Piedmont's claim that the ALC's ruling has only an incidental burden on interstate commerce because it affects only Carolinas is patently incorrect and refuted by the ALC's express goal of reducing outmigration of York County residents seeking healthcare beyond the county.

Additionally, Piedmont's argument under the undue burden test mistakenly limits the assessment of the burdens on interstate commerce by examining only the effects of the ALC's ruling on Carolinas without analyzing how the ALC's application would affect interstate commerce if it is applied in a similar fashion in other cases or by other states. Dormant Commerce Clause jurisprudence requires reviewing courts not to focus on the impact on the specific parties before them but to evaluate the practical effect of an application of a challenged statute "by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. Piedmont, however, ignores this part of the analysis.

Under this analysis, the ALC's application of the Criteria and CON Act has more than an incidental burden on interstate commerce. If many or every state enacted or applied certificate of need regulations to prevent local residents from obtaining healthcare from out-of-state or non-local providers, it would have a substantial burden on interstate competition by reducing competition in interstate markets, barring competitors from entering local markets, and reducing the number of healthcare consumers obtaining healthcare in out-of-state or non-local markets. The ultimate effect of such widespread

regulations would be higher prices and lower quality healthcare. *See Fla. Transp. Servs. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012) (finding that adoption of challenged stevedoring permitting practices by other governmental entities would burden interstate commerce by barring market entry, raising prices, and reducing quality of stevedoring services); *see also Environmental Techs. Council v. South Carolina*, 901 F. Supp. 1026 (D.S.C. 1995) (finding South Carolina hazardous waste statutes and regulations violated dormant Commerce Clause, in part, based on impact of other states adopting similar regulatory schemes). The Court should reject Piedmont's attempt to limit the undue burden analysis to the effect of the ALC's ruling on Carolinas and instead examine the practical effect of the ALC's application of the Criteria and CON Act if other states applied similar schemes aimed to keep patients in local healthcare markets and out of non-local and out-of-state markets.

Accordingly, the ALC's application of the Criteria and CON Act has more than an incidental burden on interstate commerce, and that burden is not outweighed by any putative local benefits. As discussed above, the putative local benefits of the perpetuation of high quality, specialized healthcare services within York County is speculative and not supported by concrete evidence. Moreover, the ALC's ruling does not advance that putative benefit because Carolinas will provide a substantial majority of the hospital care that York County residents require, and any services that Carolinas will not provide will continue to be accessible to York County residents in nearby Charlotte. Lastly, the state has reasonable alternatives to ensure that any specialized healthcare services potentially in jeopardy remain in York County without unnecessarily burdening interstate commerce, as the ALC has done. The ALC's application of the Criteria and

CON Act violate the dormant Commerce Clause under the undue burden test, and Piedmont's claims to the contrary fail.

II. THE ALC ERRONEOUSLY, ARBITRARILY, AND CAPRICIOUSLY APPLIED THE CON LAWS ON ADVERSE EFFECTS OF DUPLICATION, IMPACT, ACCESSIBILITY, AND NEED.

A. The ALC erroneously applied the CON Act and the State Health Plan by failing to properly balance the adverse effects of duplication against improved accessibility.

Piedmont's argument on the ALC's application of the CON Laws misstates two critical points: First, the CON Act and the State Health Plan require that the ALC weigh the "adverse affects [sic] caused by the duplication,"[4] of a new hospital and an existing hospital, but they do not require that the ALC protect the market share of the existing hospital or otherwise insulate it from increased competition. Second, the weighing process requires the ALC to consider whether "the benefits of improved accessibility" outweigh the adverse effects even if they exist, and the substantial evidence at trial establishes that Carolinas' proposed hospital would improve accessibility to patients in York County, including medically underserved patients.

Piedmont is the only medical provider with a hospital in York County, and it prefers to keep things that way. Piedmont's challenge to the award of a CON to Carolinas was premised on the argument that, prior to the construction of a new hospital, it was losing the competition to attract patients to its hospital in Rock Hill because of the expansion of Carolinas' physicians network into York County. Piedmont claims that the introduction of a new hospital would further exacerbate those losses. In particular, it argued to the ALC that CMC-FM represents a real threat because tertiary and acute care

[4] S.C. Code Ann. § 44-7-180(B)(4); 2004-2005 Plan, p. II-9 (R. p. 3064) (emphasis added).

patients would be referred to Carolinas' larger hospitals in Charlotte. (R. pp. 96-97). Ironically, it proposes to reverse this "outmigration" by doing the exact same thing – by referring tertiary and acute care patients from its proposed primary care hospital, FMMC, to its larger hospital in Rock Hill, which happens to be the only hospital in York County. (R. p. 608, line 18-p. 609, line 14). By this convenient logic, the patients would be kept in York County, rather than being sent to another hospital that, while physically closer to them, is owned by a competitor over the state line.[5]

As stated above, Piedmont's argument ignores the fact that the State Health Plan specifically contemplates that patients often seek and receive healthcare outside of their county of residence and that hospital service areas may cross regional and state boundaries. (R. p. 3057). Piedmont's former CEO, Charles Miller, testified that the "natural tendency" of residents in Northern York County is to seek healthcare in Charlotte because they are "oriented" in that direction by their work, shopping, and other interests. (R. p. 974, line 24-p. 976, line 10). He acknowledged that despite Piedmont's relatively low number of patients in Northern York County, its construction of a new hospital is a "defensive strategy" intended to keep North Carolina providers from encroaching upon Piedmont's market share. (R. p. 1019, line 2-p. 1021, line 3). In short, the "adverse impact" argument to which the ALC devoted approximately half[6] of the court's findings in the Amended Final Order is only a slight variation of Piedmont's unsuccessful arguments before Judge Matthews in the First Contested Case – that only

[5] By contrast, Piedmont's expert, Joel Grice, conceded in his earlier, 2006 decision issued while he was employed at DHEC that none of the applicants, including Piedmont, could reverse "outmigration," and that crossing over state lines for tertiary or emergency care was often warranted. (R. p 1182, line 23-p. 1187, line 12).

[6] These findings start at p. 11 of the Amended Final Order and extend to p. 26. (R. pp. 84-99)

the existing hospital in York County is entitled to build a new hospital in York County and the incursion of North Carolina providers should be prohibited.

Neither the CON Act, Criteria, nor the State Health Plan state their purpose as protecting existing providers from competition. They instead require that DHEC, and ultimately the ALC, consider the adverse effects of the duplication of hospitals, and whether any adverse effects are outweighed by improved accessibility to patients. Duplication would result by Piedmont's construction of its own hospital in relatively close proximity to its existing hospital in Rock Hill, and Carolinas' expert testified that this duplication would have an adverse effect on Piedmont. (R. p. 1845, line 16-p. 1849, line 11). Instead of focusing on duplication, the ALC mistakenly focused on competition. It relied on the testimony of three "independent"[7] physicians, all of whom testified that the existing encroachment of Carolinas' physician practices into York County resulted in a decline in their own utilization, and that in their view Piedmont would only be able to maintain its business by keeping its North Carolina competitor out of York County.

It is readily apparent that these witnesses are far from "independent." Piedmont's first "independent" witness, Dr. Arun Adlakha, testified that he was then on the Board of Governors of Piedmont. (R. p. 335, line 2-p. 337, line 6). The two other "independent" physicians offered by Piedmont as witnesses, Dr. Sunsil Singhi and Dr. Norman Taylor, had equally strong connections with Piedmont and had engaged in discussions with Piedmont about affiliation. Dr. Singhi acknowledged that his partner was on the Board of Governors of Piedmont and that his practice was "currently talking" with Piedmont about becoming employed by Piedmont as part of its system. (R. p. 897, lines 1-14). Dr.

[7] In its first Order, the ALC described these physicians as "independent." (R. pp. 45-46, 48).

Taylor testified that he was formerly Chief of Staff at Piedmont, he was currently on the Credentials Committee for the medical staff, his partner in his medical practice was Chairman of the Board of Governors of Piedmont, and that his practice had discussed affiliating with Piedmont's parent, Tenet, on "several occasions."[8] (R. p. 403, lines 2-16, p. 438, lines 12-23, p. 448, lines 1-24, p. 2666). The 45 "independent" physicians[9] who supported Piedmont's application consisted of 34 physicians from Piedmont's medical staff, including many from Dr. Singhi's and Dr. Taylor's medical practices. (R. pp. 2416-2425, 3011-3012). It is not surprising that other doctors from the York County Medical Society joined in, as Dr. Singhi is the Society's current president, Dr. Taylor was a past president, and Piedmont operates the only hospital in York County. (R. p. 403, lines 8-10, pp. 2428, 3011-3012).

The remainder of Piedmont's "adverse impact" evidence was presented through the testimony of its healthcare experts, Joel Grice, Dan Sullivan, and David Levitt. While all three experts advanced Piedmont's theory of adverse impact caused by increased competition, the majority of them did not agree that CMC-FM would be less accessible or would fail to provide services to the medically underserved. In his testimony, Grice found that that CMC-FM would provide improved accessibility for patients, Carolinas equally met the "accessibility" criteria under Criterion 3(d), (f), and (g), and CMC-FM would be an accessible facility to the medically underserved.[10] (R. p. 1097, line 9-p.

[8] Dr. Taylor also testified that his practice talked to Carolinas "years ago" about becoming affiliated. (R. p. 438, lines 17-19).

[9] Although its brief uses the term "non-contractually bound," Piedmont routinely identified these physicians as "independent" in its submissions to DHEC and during project review. (R. pp. 2796,3011-3012).

[10] S.C. Regs. 61-15 § 802.3(d), (f) and (g).

(continued on next page)

1098, line 23, p. 1103, lines 3-16, p. 1182, line 6-p. 1183, line 4, p. 3217). Sullivan also found that Carolinas and Piedmont equally meet these Criteria, and he conceded at trial that he thought CMC-FM would be as equally accessible as FMMC. (R. p. 1163 (p. 1251, line 23-p. 1252, line 7), p. 2130, line 20-p. 2131, line 5, p. 3217).

Implicit in Piedmont's "adverse impact" argument is the acknowledgement that CMC-FM would be well-utilized and improve accessibility to its existing patients in Northern York County. Carolinas' market share for primary care, community hospital services in Northern York County was approximately 52.9% in 2009, and from 2005 to 2010 Carolinas' hospitals in North Carolina experienced a 69% increase in total inpatient discharges of York County residents. (R. p. 1323, lines 3-17, pp. 2132-2133, 2172). Despite the fact that Piedmont operates the only hospital in York County, only 28.7% of patients in Northern York County who received community hospital services in 2009 obtained treatment at Piedmont. (R. pp. 2132-2133, 2172).

The CON Act makes clear that the adverse effects of duplication alone are insufficient to justify denying a CON to a new hospital when those effects are outweighed by increased accessibility to patients. The bulk of the evidence, including testimony from Piedmont's own experts, established that accessibility to patients would be improved by CMC-FM and that accessibility to the medically underserved would not

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3. Distribution (Accessibility):

d. The proposed facility should not restrict admissions. If any restrictions are applied, their nature should be clearly explained. ...

f. The applicant should address the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, women, the elderly, handicapped persons, and other medically underserved groups, are likely to have access to those services being proposed.

g. The facility providing the proposed services should establish provisions to insure that individuals in need of treatment as determined by a physician have access to the appropriate service, regardless of ability to pay.

be diminished, as Piedmont argues. Piedmont's "adverse impact" argument is simply a restatement of its prior, flawed argument that only the existing hospital in York County should be allowed to build a new hospital in the county because the ALC is obliged to protect the incumbent hospital from competition that existed even before the new hospital is built.

B. The ALC erroneously, arbitrarily, and capriciously concluded that a larger Piedmont hospital was justified and better for York County.

Piedmont concludes in its Initial Brief that CMC-FM would "decrease accessibility by causing the reduction or elimination of specialty services in [York County], by restricting access for medically underserved patients, and by designing and building a hospital too small to meet the growing demands of [York County]." (Piedmont's Initial Brief, p. 36.)

As discussed previously, the concept of building a primary care hospital in Fort Mill and treating tertiary or specialty services at another hospital is the same proposal advanced by Piedmont, and Piedmont's own experts do not support its argument that FMMC will be "more accessible" to the medically underserved than CMC-FM. In support of its claim regarding the need for a larger hospital, Piedmont made the remarkable assertion in its opening statement at the hearing that Piedmont needs a larger hospital in Fort Mill because its existing hospital in Rock Hill is underutilized. Piedmont's counsel asserted:

> Now, Piedmont wants to build a 100-bed facility, a 100-bed hospital in Fort Mill. And to get to a 100 beds, Piedmont has to transfer 36 of its present beds in Rock Hill, up to Fort Mill. And as Mr. Masterton [Piedmont's current CEO] will tell you, that's not going to be a problem in doing that because right now on any given day on any average day at Piedmont Medical Center, he'll tell you there are about 100 unused beds at Piedmont. There are whole wings of the hospital that are shut down right now, they're

> closed off where beds are not being used. So transferring 36 beds to Fort Mill not only won't be a problem, it makes sense.

(R. p. 289, lines 6-20). This "underutilization" argument is even more unfathomable considering Piedmont's diminishing number of patients from Northern York County, where the new hospital will be located. Piedmont's market share for community hospital services in Northern York County diminished from a high of 47.3% in 2003 to a low of 28.7% in 2009. (R. p. 2132).

Piedmont's larger hospital also comes at a substantial increased cost – ranging from $42 million to almost $63 million more than CMC-FM,[11] depending on whether FMMC is financed - which is inconsistent with the CON Act's purpose of "cost containment." More importantly, as noted in counsel's opening statement quoted above, Piedmont intends to fill FMMC with patients from the Greater Rock Hill area, and not Northern York County or Western York County. In his testimony, Piedmont's expert, David Levitt, acknowledged that Piedmont's revised projections and patient origin numbers since its original application had the majority of its proposed patients at FMMC originating from the Greater Rock Hill area, and not from Northern York County, and it decreased its projection of patients originating in Western York County by over 800 patients. (R. p. 912, line 1-p. 914, line 9, pp. 2216, 3229). As part of its strategy to protect its market share, Piedmont justified its larger, far more expensive hospital by claiming it would fill FMMC with patients from Greater Rock Hill who should be seen at the existing, underutilized Piedmont Medical Center in Rock Hill.

[11] The ALC erroneously found that CMC-FM hospital would cost $79,101,360. (R. p. 80). The actual project cost is approximately $1.5 million less - $77,532,435. FMMC proposed hospital cost is $119,808,964 or $146,522,042, depending on whether the construction is financed and includes financing costs. (R. pp. 80-81).

Piedmont's alternative argument is that CMC-FM will be so well-utilized that it is too small. This argument illustrates perfectly that Carolinas is the applicant best suited to provide accessibility. Carolinas was required, however, to meet the 64-bed need outlined in the State Health Plan. Piedmont's insistence that Carolinas should have transferred beds from another hospital, as Piedmont did, is a new argument that is inconsistent with the position it took throughout the Second Contested Case that it was the only applicant eligible to transfer beds and to build a 100-bed hospital. When asked the specific question, Piedmont's expert David Levitt only identified Piedmont and another South Carolina hospital in Lancaster County as eligible to transfer beds to Fort Mill, and he suggested that Carolinas would have needed to affiliate with a South Carolina hospital to accomplish that transfer. (R. p. 910, line 6-p. 911, line 22).

C. Piedmont's criticism of DHEC is not supported by the evidence.

Piedmont's criticism of Beverly Brandt's experience and credentials at DHEC in a footnote is unwarranted. (Piedmont's Initial Brief, p. 41, n. 9.) Ms. Brandt has a Master's degree in Public Health. Prior to assuming Grice's position at DHEC, she had 22 years of experience in DHEC's Bureau of Radiological Health, where she had extensive experience working with healthcare facilities. (R. p. 1200, line 4-p. 1201, line 24, p. 1204, line 5-p. 1205, line 15). More importantly, her review of the applications involved others in DHEC, including experienced health care planner Les Shelton who had been engaged in the prior review, as well as others who attended project review and who participated in the analysis of the applications. (R. p. 1207, line 13-p. 1208, line 23). Piedmont's criticism was not shared by the ALC, who described DHEC staff's review as

"thorough and detailed" and concluded that DHEC "properly reviewed and analyzed the applications." (R. p. 124).

CONCLUSION

For the foregoing reasons, Carolinas requests that the Court vacate the ALC's Amended Final Order and reinstate DHEC's issuance of the Fort Mill CON to Carolinas. In the alternative, Carolinas requests that the case be remanded to the ALC for a determination of which applicant most fully complies with the requirements, goals, and purposes of the CON Act, the 2004-2005 Plan, Criteria, and other applicable regulations in accordance with the appropriate legal standards discussed above and in Carolinas' Initial Brief.

Respectfully submitted,

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

July 31, 2015

040057.3

The South Carolina Court of Appeals

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center d/b/a Fort Mill Medical Center, Respondent,

v.

South Carolina Department of Health and Environmental Control and the Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill, Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill is the Appellant.

Appellate Case No. 2015-000056

ORDER

The Charlotte Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (CHS), appeals the Administrative Law Court's order directing the South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Amisub of South Carolina, d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont) approving the building of a hospital in Fort Mill. The ALC's order reversed a 2011 decision by DHEC denying Piedmont's CON application and granting CHS a CON to build a hospital in Fort Mill.

Pursuant to section 44-7-220(B) of the South Carolina Code (Supp. 2014), CHS was required to post a $1.5 million bond to perfect its appeal. CHS posted the bond and filed a motion with this court seeking relief from the appeal bond, arguing the bond requirement is unconstitutional because it violates the separation of powers doctrine and its equal protection and due process rights. Additionally, CHS asks this court to stay the ALC's order because CHS would be irreparably

harmed if Piedmont were allowed to proceed with the project approved in its CON. After careful consideration, we deny CHS's motion.

I. Appeal Bond

CHS seeks relief from the appeal bond, arguing the appeal bond requirement in section 44-7-220(B) is unconstitutional because (1) it is a violation of separation of powers because the General Assembly cannot promulgate rules of procedure that conflict with existing rules of procedure promulgated by the judiciary; (2) the bond requirement violates the Equal Protection Clause because it treats CON appellants differently than all other appellants; and (3) the bond requirement violates the Due Process Clause because the requirement that CHS post a $1.5 million bond significantly burdens its right to judicial review. We disagree.

1. Separation of Powers

The appeal bond requirement set forth in 44-7-220(B) does not infringe on the constitutional mandate of separation of powers. *See* S.C. Const. art. V, § 4 ("The Supreme Court shall make rules governing the administration of all the courts of the State. Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts."). Our supreme court has interpreted Article V, Section 4, as "establish[ing] the intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure." *Stokes v. Denmark Emergency Med. Serv.*, 315 S.C. 263, 267, 433 S.E.2d 850, 852 (1993). The fact that Article V, Section 4A, requires all court rules promulgated by the supreme court to be submitted to a General Assembly committee further demonstrates the General Assembly's primacy in such matters. Additionally, we find CHS's reliance on *In re Circuit Court Rule 102*[1] misplaced because that order recognizes the limits on the court's rule making power in relation to substantive statutory law and *In re Circuit Court Rule 102* predates the adoption of Article V, Section 4A.

2. Equal Protection Clause

We hold the bond requirement does not violate the Equal Protection Clause. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs.*, 370 S.C. 452, 480, 636 S.E.2d 598, 613 (2006) ("To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the legislative purpose sought to be achieved, (2)

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[1] *In re Circuit Court Rule 102*, S.C. Sup. Ct. Order dated August 31, 1982.

members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis."); *see also Bodman v. State*, 403 S.C. 60, 70, 742 S.E.2d 363, 368 (2013) (stating that in an equal protection analysis, "[t]he classification also does not need to completely achieve its purpose to withstand constitutional scrutiny," nor does "[t]he fact that the classification may result in some inequity" render the classification unconstitutional (internal quotation marks omitted)). Here, the bond requirement represents the Legislature's attempt to hold funds to compensate a respondent harmed by the delay of its approved project during the adjudication of a CON appeal. The fact that section 44-7-220(B) initially sets the bond based on the total cost of the project being appealed suggests that the bond is intended to protect the party whose CON project has been approved. *See* § 44-7-220(B) ("The bond must be . . . in an amount equal to five percent of the total cost of the project or one hundred thousand dollars, whichever is greater, up to a maximum of one million five hundred thousand dollars."). We find further support for this intent in section 44-7-220(C)(1), which focuses on frivolous appeals and allows the court to "award damages incurred *as a result of the delay*, as well as reasonable attorney's fees and costs, to the party whose project is the subject of the contested case or judicial review." S.C. Code Ann. § 44-7-220(C)(1) (Supp. 2014) (emphasis added). Thus, there is a rational basis for the statute's provision awarding a respondent the appeal bond if the ALC's decision is upheld, and this provision was related to a legitimate government interest of compensating a party whose CON had been approved by the ALC and who incurred delay costs as a result of the appeal.

CHS's reliance on *Lindsey v. Normet*, 405 U.S. 56 (1971), is misplaced. In *Lindsey*, the United States Supreme Court held unconstitutional an Oregon statute requiring defendants in forceful entry and detainer (FED) cases to post an appeal bond equal to twice the rental value of the premises in addition to the bond all civil appellants were required to post. 405 U.S. at 74-77. Under the statutory scheme, if the tenant lost the appeal, the landlord was automatically entitled to double the accrued rent without proof of actual damages. *Id.* at 63-64.

The double bond scheme found in *Lindsey* is distinguishable from the appeal bond in this case. First, the *Lindsey* court found "nothing in the special purposes of the FED statute or in the special characteristics of the landlord tenant relationship to warrant" treating FED appellants differently than all other appellants. *Id.* at 77. In the present case, the imposition of the appeal bond promotes the CON Act's purpose of providing for the efficient regulation and construction of healthcare facilities. *See* S.C. Code Ann. § 44-7-120 (2002) (stating some of the purposes of the CON Act are to "guide the establishment of health facilities and services which

will best serve public needs, and ensure that high quality services are provided in health facilities in this State").

Moreover, the posting of the bond and automatic awarding of the bond to the respondent upon affirmance of the CON award is meant to protect the respondent from any delay caused by the appeal process. This, too, serves the CON Act's purpose of guiding the establishment of health facilities and providing needed healthcare services to the citizens of the state. And, although an automatic awarding of the appeal bond could result in a windfall for a party that continued with its project and suffered no delay costs, we recognize the amount of the appeal bond could also constitute a shortfall to the party who chose to delay and incurred more delay costs than provided for in the appeal bond. Therefore, the appeal bond, though imperfect and imprecise, provides some balance to these two potentially unfair outcomes and is related to a rational government purpose. *See O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 859-60 (9th Cir. 1976) ("Legislative categories need not be drawn with mathematical nicety . . . for classification necessarily involves approximation; but legislative classifications which are not only imprecise, but lack rational relationship to their avowed purpose, are invalid." (internal citation and quotation marks omitted)); *see also Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992) ("The classification does not need to completely accomplish the legislative purpose with delicate precision in order to survive a constitutional challenge."). For these reasons, we conclude the appeal bond provision satisfies the requirements of equal protection.[2]

3. Due Process Clause

We find there has been no violation of CHS's right to due process. *See Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) ("The fundamental requirements of due process under the United States Constitution and the South Carolina Constitution include notice, an opportunity to be heard in a meaningful way, and judicial review.").

CHS has successfully initiated its appeal of the ALC's decision, and this court will adjudicate the appeal. Even if CHS is correct that a party's ability to afford the appeal bond should not be considered, a party must still demonstrate or provide

[2] We find CHS's reliance on *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 422 (Ky. 2005), inapplicable because *Elk Horn Coal* concerns a penalty bond, and the purpose of the appeal bond in section 44-7-220(B) is not to penalize CON appellants.

some evidence the appeal bond requirement *actually denies* access to judicial review in order to claim a due process violation. *See Olson v. SCDHEC*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008) ("To prevail on a claim of denial of due process, there must be a showing of substantial prejudice."). CHS has not demonstrated it has been denied the right to judicial review. Rather, CHS asserts the appeal bond "significantly burdens their access to judicial review." However, the *Lindsey* court recognized the propriety of "reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals" if such rules were not arbitrary and irrational. 405 U.S. at 78. As discussed above, we find requiring certain CON appellants to post an appeal bond is not arbitrary and irrational but instead is rationally based on a legitimate government purpose. For these reasons, we find no due process violation.

II. Request to Stay the ALC's Order

CHS is not entitled to a stay of the ALC's order. Initially, we note there is no danger this issue will become moot or this court will lose jurisdiction because Piedmont will have to cease development of its hospital if we were to find error in the ALC's approval of Piedmont's CON. *See* Rule 241(c)(2), SCACR (requiring courts to consider whether an order for supersedeas "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot"); *S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013) ("A case is moot where a judgment rendered by the [c]ourt will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the [c]ourt."). Furthermore, CHS cannot show that without the stay, it will suffer irreparable harm. Our courts typically require something more than economic loss in order to find irreparable harm. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455 n.2, 626 S.E.2d 34, 37 n.2 (Ct. App. 2005) ("'While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business.'" (quoting *District of Columbia v. E. Trans–Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C. 2000))). Here, the alleged changes in referral patterns would directly impact market share and thus, constitute a purely economic harm. Moreover, the ALC's order documents CHS's effort, beginning in 2005 and continuing into 2011, to change referral patterns by adding physicians into its network, who were then required by contract to refer patients to other CHS facilities and doctors. *See* Amended Order, Findings of Fact Nos. 23-26. Further, the ALC noted when it denied CHS's request for a stay that CHS argued during trial that its Fort Mill hospital would function primarily to relieve high patient volume at its other hospitals, rather than provide it new revenue streams. *See*

ALC's Order Denying CHS's Motion to Stay, pg. 5. Therefore, it is not clear that allowing Piedmont to begin its project would cause physicians to immediately flee CHS's network in favor of Piedmont or otherwise threaten CHS's existence. Thus, CHS's arguments fail, and CHS's request for a stay is denied.

C.J.

J.

J.

Columbia, South Carolina

cc: Douglas M. Muller, Esquire
Trudy Hartzog Robertson, Esquire
E. Brandon Gaskins, Esquire
Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Ashley Caroline Biggers, Esquire
Vito Michael Wicevic, Esquire

FILED
09-08-2015

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center, Respondent,

v.

South Carolina Department of Health and Environmental Control and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill, is the Appellant.

Appellate Case No. 2015-000056

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 2017-UP-013
Heard November 8, 2016 – Filed January 11, 2017

AFFIRMED

Douglas M. Muller, Trudy Hartzog Robertson, and E. Brandon Gaskins, of Moore & Van Allen PLLC, of Charleston, for Appellant.

Stuart M. Andrews, Jr. and Daniel J. Westbrook, of Nelson Mullins Riley & Scarborough LLP, of Columbia, for Respondent Amisub of South Carolina.

Ashley Caroline Biggers and Vito Michael Wicevic, of Columbia, for Respondent South Carolina Department of Health and Environmental Control.

PER CURIAM: Appellant Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center-Fort Mill (Carolinas), challenges a decision of the South Carolina Administrative Law Court (ALC) ordering Respondent South Carolina Department of Health and Environmental Control (DHEC) to issue a Certificate of Need (CON) to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center (Piedmont). Carolinas argues the purpose and effect of the ALC's application of the CON Act, the Project Review Criteria,[1] and the 2004-2005 State Health Plan (State Health Plan) are to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause.[2] Carolinas also argues the ALC erred in approving Piedmont's proposal to transfer beds from its existing hospital in Rock Hill to its proposed hospital in Fort Mill because the ALC failed to make any findings of fact or conclusions of law regarding the eight criteria in the Bed Transfer Provision of the State Health Plan.[3] Finally, Carolinas contends the ALC's application of certain Project Review Criteria was arbitrary and capricious. We affirm.

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[1] There are thirty-three criteria for DHEC's review of a project under the CON program. S.C. Code Ann. Regs. 61-15 § 802 (2011) (amended 2012).

[2] The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, grants Congress the power to regulate commerce among the several states. However, "[e]ven in the absence of Congressional regulation, the negative implications of the Commerce Clause, often referred to as the Dormant Commerce Clause, prohibit state action that unduly burdens interstate commerce." *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011) (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)).

[3] Chapter II.G.1 § (A)(4)(h), State Health Plan (Bed Transfer Provision). The Bed Transfer Provision allows for the transfer of beds between affiliated hospitals "in order to serve their patients in a more efficient manner," provided certain conditions are met.

FACTS/PROCEDURAL HISTORY

Piedmont Medical Center in Rock Hill is the sole hospital in York County. It provides standard community hospital services as well as specialized services, such as open heart surgery, neurosurgery, neonatal intensive care, and behavioral health. Amisub of South Carolina, Inc., which is a subsidiary of Tenet Healthcare Corporation, operates Piedmont Medical Center. Tenet Healthcare Corporation is headquartered in Dallas, Texas and owns forty-nine hospitals in ten states. Carolinas, which is headquartered in Charlotte, North Carolina, owns multiple hospitals in North Carolina with a large network of employed physicians, many of whom have practices in York County. Additionally, Carolinas owns and operates Roper Hospital in downtown Charleston.

In 2005, Piedmont, Carolinas, Presbyterian Healthcare System (Presbyterian), and Hospital Partners of America, Inc. submitted their respective applications for a CON to build a sixty-four-bed hospital near Fort Mill based on the State Health Plan's identification of a need for sixty-four additional acute care hospital beds in York County. Subsequently, Piedmont withdrew its application and submitted a new application for a 100-bed hospital, which would include thirty-six beds transferred from Piedmont's Rock Hill facility to its proposed Fort Mill facility. In 2006, DHEC approved Piedmont's new application and denied the other three applications. Carolinas and Presbyterian filed separate requests for a contested case hearing before the ALC, which took place in September 2009.

Prior to the contested case hearing, Carolinas and Presbyterian filed summary judgment motions on the ground that DHEC misinterpreted the State Health Plan to allow only existing providers to fulfill the designated need for additional hospital beds in York County. During the hearing, Carolinas and Presbyterian renewed these motions, which the ALC granted. In December 2009, the ALC issued an order remanding the case to DHEC for a determination of which applicant most fully complied with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations.[4] The remaining three

[4] When DHEC is considering competing applications, it must award a CON on the basis of which applicant most fully complies with the CON Act, the State Health Plan, Project Review Criteria, and applicable DHEC regulations. S.C. Code Ann. § 44-7-210(C) (2002) (amended 2010). The ALC rejected the arguments of

applicants appealed the ALC's remand order; however, our supreme court dismissed the appeal because the remand order was interlocutory. *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

By October 2010, the three remaining applicants submitted to DHEC additional information to supplement their respective applications. In September 2011, DHEC granted Carolinas' application and denied the applications of Piedmont and Presbyterian. Piedmont and Presbyterian submitted their respective requests for a contested case hearing before the ALC, and the ALC consolidated the cases. Presbyterian later withdrew its request, and the ALC dismissed Presbyterian as a party. The ALC conducted a contested case hearing over the course of fifteen days in April and May 2013 and subsequently ordered DHEC to award the CON to Piedmont. Carolinas filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, and the ALC issued an Amended Final Order denying the motion. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act governs the standard of review from a decision of the ALC, allowing this court to

> reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2016).

LAW/ANALYSIS

Carolinas and Presbyterian that Piedmont was not a "competing applicant" for purposes of section 44-7-210(C).

I. Dormant Commerce Clause

Carolinas does not challenge the constitutionality of the CON Act itself. Further, Carolinas does not challenge the constitutionality of the State Health Plan or the Project Review Criteria. Rather, Carolinas argues the purpose and effect of the ALC's application of the CON Act, the State Health Plan, and the Project Review Criteria are to protect Piedmont from out-of-state competition, and, therefore, such an application violates the Dormant Commerce Clause. In particular, Carolinas challenges the ALC's conclusions of law concerning adverse impact and outmigration as violating the Dormant Commerce Clause. However, the record does not show Carolinas presented to the ALC any argument that Piedmont's positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. Carolinas waited until filing its Rule 59(e) motion to present this argument, which is too late. *See, e.g.*, *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding an issue raised for the first time in a Rule 59(e) motion was not preserved for review).

In its Rule 59(e) motion, Carolinas stated a Dormant Commerce Clause argument was presented in writing to the ALC after the conclusion of the 2009 contested case hearing. However, the record reflects that any Dormant Commerce Clause argument raised by the parties in 2009 would have concerned DHEC's interpretation of the State Health Plan to allow only existing providers to obtain a CON to fulfill York County's need for more hospital beds. There is nothing in the record showing that the issues of adverse impact or outmigration even could have been reached before the ALC issued its December 2009 order remanding the case to DHEC to consider all three competing applications.

Issue preservation is especially important when a party raises an as-applied Dormant Commerce Clause argument because the determination of a Dormant Commerce Clause violation is fact-intensive. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (stating the two tests for determining a violation of the Dormant Commerce Clause are both "fact-bound"); *Travelscape*, 391 S.C. at 109, 705 S.E.2d at 38 (referring to an "as-applied" constitutional challenge to a statute or regulation as an "inherently factual issue"); *id.* at 109, 705 S.E.2d at 39 (stating the ALC is "better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision"). Therefore, during the 2013 contested case hearing, it was incumbent upon Carolinas to present, with supporting evidence, the argument

it now makes on appeal, i.e., the ALC's adoption of Piedmont's positions on adverse effect and outmigration would violate the Dormant Commerce Clause. Because Carolinas did not do this, it has failed to preserve its Dormant Commerce Clause argument for this court's review.

II. Bed Transfer Provision

Carolinas next argues the ALC exceeded its authority under the CON Act and the State Health Plan in approving Piedmont's proposal to transfer beds without making any findings of fact or conclusions of law addressing the requirements of the Bed Transfer Provision. Piedmont correctly points out that Carolinas did not raise this issue during the contested case hearing or in its Rule 59(e) motion, and, therefore, it is not preserved for review. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) ("[A]ll parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling."); *West v. Newberry Elec. Coop.*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding an issue unpreserved when it was neither addressed in the final order nor mentioned in the appellant's Rule 59(e) motion).

III. Arbitrariness and Capriciousness

Carolinas contends the ALC's application of certain Project Review Criteria was arbitrary and capricious. We hold the ALC's decision was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious. *See Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985) ("A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.").

CONCLUSION

Accordingly, we affirm the ALC's Amended Final Order.

AFFIRMED.

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2015-000056
Lower Court Docket No. 11-ALJ-07-0575-CC

Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center
d/b/a Fort Mill Medical Center ..... Respondent,

v.

South Carolina Department of Health and Environmental Control
and The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill ..... Respondents,

Of whom The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas
Medical Center-Fort Mill, is ..... Appellant.

PETITION FOR REHEARING

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SC Court of Appeals

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

Pursuant to Rules 221(a) and 240, SCACR, Appellant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center-Fort Mill ("Carolinas") files this Petition for Rehearing as to the Order of the Court of Appeals (the "Court") filed on September 8, 2015, and Opinion No. 2017-UP-013 of the Court filed on January 11, 2017.

STATEMENT OF THE CASE

Carolinas filed its Notice of Appeal of the Amended Final Order of the Administrative Law Court ("ALC") with this Court on January 14, 2015. After filing the Notice of Appeal, Carolinas filed a cash bond pursuant to S.C. Code Ann. § 44-7-220(B) with the Clerk of the Court in the sum of one million five hundred thousand dollars, which is the maximum amount payable by that statute. On March 17, 2015, Carolinas filed a Motion for Relief from Bond and Petition for Supersedeas Pending Final Resolution of Appeals Process ("Motion for Relief and Petition for Supersedeas").

On March 19, 2015, the Court issued an Order which instructed Carolinas that any amendment of the pending Motion for Relief and Petition for Supersedeas be filed within ten days of the Court's Order. On March 27, 2015, in accordance with the Court's Order of March 19, 2015, Carolinas filed a Supplemental Brief and Amendment of Motion for Relief and Petition for Supersedeas ("Supplemental Brief"). The Court filed an Order on September 8, 2015, denying Carolinas' Motion for Relief and Petition for Supersedeas.

On January 11, 2017, the Court filed Opinion No. 2017-UP-013 (the "Opinion"), which affirmed the Amended Final Order of the ALC, ordering Respondent South Carolina Department of Health and Environmental Control ("DHEC") to issue a Certificate of Need ("CON") to Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, d/b/a Fort Mill Medical Center ("Piedmont"). In affirming the ALC's Amended Final

Order, the Court made three rulings with respect to the findings made by the ALC: (1) Carolinas' Dormant Commerce Clause argument was not preserved for appellate review; (2) Carolinas' bed transfer provision argument was not preserved for appellate review; and (3) the ALC's Amended Final Order was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious.

Carolinas now moves this Court for a rehearing on the Court's rulings in its Order filed September 8, 2015 on its request for relief from the bond requirement, and on the Court's rulings in the Opinion regarding the Dormant Commerce Clause and the application of the arbitrary and capricious standard based on the Court's misapprehension and misapplication of the arguments raised by Carolinas, the applicable law, and the record on appeal.

REHEARING STANDARD

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR, states: "A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." In order to prevail on a petition for rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) .

ARGUMENT

I. THE COURT MISAPPREHENDED OR OVERLOOKED THE FACT THAT CAROLINAS PRESERVED THE DORMANT COMMERCE CLAUSE ARGUMENT FOR APPELLATE REVIEW.

a. Carolinas did not include evidence in the record on appeal or provide argument in its Final Brief to address the preservation of its Dormant Commerce Clause argument for appellate review because this issue was not raised on appeal.

At oral argument of this appeal on November 8, 2016, the Court raised *sua sponte* whether Carolinas had properly preserved its Dormant Commerce Clause argument for appellate review. In the Court's subsequent written decision of January 11, 2017, the Court has determined that Carolinas did not preserve the argument based on its belief that the record on appeal was devoid of any evidence that the issue had been raised during the contested case hearing prior to Carolinas filing of a Rule 59(e) motion. Specifically, the Court determined that:

> However, the record does not show Carolinas presented to the ALC any argument that Piedmont's positions on adverse impact and outmigration, if adopted by the ALC, would violate the Dormant Commerce Clause. Carolinas waited until filing its Rule 59(e) motion to present this argument, which is too late . . . [;]
>
> In its Rule 59(e) motion, Carolinas stated a Dormant Commerce Clause argument was presented in writing to the ALC after the conclusion of the 2009 contested case hearing. However, the record reflects that any Dormant Commerce Clause argument raised by the parties in 2009 would have concerned DHEC's interpretation of the State Health Plan to allow only existing providers to obtain a CON to fulfill York County's need for more hospital beds. There is nothing in the record showing that the issues of adverse impact or outmigration even could have been reached before the ALC issued its December 2009 order remanding the case to DHEC to consider all three competing applications[;] [and] . . .
>
> during the 2013 contested case hearing, it was incumbent upon Carolinas to present, with supporting evidence, the argument it now makes on appeal, i.e., the ALC's adoption of Piedmont's positions on adverse effect and outmigration would violate the Dormant Commerce Clause. Because

Carolinas did not do this, it has failed to preserve its Dormant Commerce Clause argument for this court's review.

The Court's determination unfairly penalizes Carolinas for failing to include in the record on appeal matters that have not been raised on appeal. In this appeal, neither Piedmont nor DHEC have argued that Carolinas failed to preserve its Dormant Commerce Clause argument.[1] In fact, Piedmont raised issue preservation in its Final Brief only as to the bed transfer issue, despite arguing to the ALC below that Carolinas failed to preserve the Dormant Commerce Clause argument. (Piedmont Final Br., p. 1.) Notably, Piedmont chose to set forth its own "Statement of Issues on Appeal," and it did not raise issue preservation as to the Dormant Commerce Clause argument. Nor did it rely on a general reference allowing the Court to affirm on any ground appearing on the record.[2] (*Id.*) Because this issue preservation argument was not raised by Piedmont or DHEC in their arguments on appeal over the Dormant Commerce Clause (*id.*; DHEC Final Br., p. i), Carolinas had no reason to provide arguments on this issue, and no reason to include in the record the underlying information necessary to address whether the issue had been preserved. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.").

[1] The fact that the parties did not argue that Carolinas failed to preserve its Dormant Commerce Clause argument in the appeal made certain portions of the ALC transcript and the ALC's file irrelevant to the appeal. Because grounds raised for the first time in the Opinion are contradicted by the ALC transcript and other ALC records, Carolinas, pursuant to Rule 212(b), SCACR, has moved to supplement the record on appeal with additional portions of the ALC transcript and the ALC's file.

[2] South Carolina Appellate Court Rule 208(b)(2) provides that: "If a respondent does include his own statement of the case, he shall be bound by the matters stated or alleged in his statement of the case." Respondent's brief may also contain argument asking the Court to affirm for any ground appearing on the record as provided by Rule 220(c), SCACR; however, here it did not.

Having no notice that the preservation of Carolinas' Dormant Commerce Clause argument was at issue on appeal, Carolinas considered it improper to include certain portions of the ALC transcript and filings submitted to the ALC during the contested case hearing. *See* Designation of Matter to be Included on the Record on Appeal, dated April 17, 2015; Rule 209, SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal. . . . The Designation shall be accompanied by a certificate signed by the party's counsel of record that the Designation contains no matter which is irrelevant to the appeal."). Carolinas therefore submits that this Court's affirmance of the ALC's Amended Final Order based upon a ground which was not raised or briefed on appeal, and which it has never had an opportunity to address, is fundamentally unfair and in error. *See* Rule 208(b)(1)(B), SCACR; *Atl. Coast Builders & Contractors, LLC v. Lewis,* 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring) ("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.")

b. The additional evidence that Carolinas proposes to supplement the record on appeal confirms Carolinas raised its Dormant Commerce Clause argument to the ALC during the contested case hearing.

i. Carolinas raised its Dormant Commerce Clause argument during its opening argument and at the close of the trial through proffer and presented testimony relating to the anti-competitive effects of Piedmont's proposed application of the State Health Plan throughout the contested case hearing.

Had Carolinas known that the Court would question whether the Dormant Commerce Clause argument had been preserved, it would have introduced into the record

on appeal the fact that Carolinas raised the Dormant Commerce Clause argument and related evidence at the contested case from its opening statement until its final post-trial proffer.

During his opening statement, Carolinas' counsel previewed evidence relating to DHEC's prior application of the CON laws to prevent an out-of-state provider, such as Carolinas, from entering the local hospital market and thereby preventing competition in violation of the Dormant Commerce Clause. This statement prompted Piedmont's counsel to take the unusual step of objecting during Carolinas' opening statement to Carolinas' arguments relating to anticompetitive practices and the exclusion of a North Carolina provider, which Piedmont insisted were to be presented to the ALC only through a proffer at the end of the hearing. (Carolinas' Motion to Supplement the Record on Appeal ("Motion to Supplement"), Attachment A: Tr. Trans. at pp. 99:6 – 102:8.)[3] The ALC subsequently agreed with Piedmont and ruled that this legal argument would need to be presented by proffer.

The colloquy between the ALC and parties' legal counsel, which took place during Carolinas' opening statement, was as follows:

> *MR. MULLER: In addition to that at the prior hearing, there was this issue of what you have referred to as, you've heard us refer to before, as the State Healthcare Plan issue. And that issue, very simply was that when we applied, we being Carolinas, applied and put in that 64-bed application. There was actually a memo issued by DHEC that said anyone can apply for this bed need, it's shown in this county as 64 beds. When Charlie Miller heard about it, Charlie Miller is Mr. Masterton's predecessor, he went to the Commission of DHEC with a state legislator, with either Mr. Andrews or Mr. Westbrook, I can't recall, and that memo was rescinded. So it was a memo saying anybody could apply, that memo was rescinded.* ***We, as an***

[3] Pursuant to Rule 240(c)(3), SCACR, Carolinas has filed a Motion to Supplement the Record on Appeal with attachments in support of its position set forth in the Motion to Supplement and this Petition for Rehearing.

applicant, then went through that entire process for a year and a half, the result of which was that Joel Grice of DHEC, who is now an expert for Piedmont decided that we, being Carolinas, were not eligible. His argument was essentially, that the only eligible provider for new beds in the county was the provider that was already in the county, which would mean perpetually, Piedmont had a lock on York County. No one could ever move there. It was an argument that strained credulity and it's an argument that we fought and Presbyterian fought at length in the last year. And what Judge Matthews ruled is that we were right, that it's a ridiculous argument to say that.

MR. ANDREWS: Your Honor, excuse me for interrupting. I really apologize. I know it's absolutely against the pale, but Mr. Muller is making the arguments the flip side of what was addressed by the motion in limine, which we were not to go into the basis for the award of the hospital based on the Plan to Piedmont. He's arguing why that was improper, which certainly invites the counter. And I'm not sure why this is being presented at all. So I apologize for the interruption, but it was something that seemed to be completely off the record.

MR. MULLER: Your Honor, this is an issue that is important, particularly for the credibility of these witnesses. ***If they had made a decision before that is intended to eliminate competition in this county and that is our counter to this adverse impact argument. Our counter is that their whole focus is on eliminating competition which is exactly what they tried to do.*** *I think in an opening statement,* ***I'm allowed to educate the Court, which I know I had before on this issue. And what they're doing now is consistent with what they've done before. They are trying to keep competition out of York County and to keep a stranglehold in York County. So that issue relates to this as much as anything else.*** *And I don't see how Mr. Andrews has the right to object during an opening statement to the presentation of information that is factual and that we're allowed to recite.*

MR. ANDREWS: If we're permitted an opportunity to explain the basis for the Department, then we're fine. I thought that was the determination that was not going to be something that was considered by you at all in this case.

THE COURT: With regard to this, I did sign that motion that we're going to allow you to make that proffer at some point, and we're going to do that at the end of the proceeding with regard to the State Health Plan. And I understand what you're saying. Let's try to keep the references to the State Health Plan to a minimum if we could. Thank you, sir.

(Carolinas' Motion to Supplement, Attachment A: Tr. Trans. at pp. 99:6 – 102:8.) (emphasis added).

The point of Carolinas' opening statement was that Piedmont was presenting a variation of its State Health Plan argument – to convince the ALC (as it had done in the previous, erroneous review by DHEC) to exclude Carolinas because it was a North Carolina provider that did not have a hospital in York County and therefore its services to York County citizens constituted "out-migration." Piedmont's objection during the opening statement, and the ALC's ruling that the argument would need to be made by proffer, effectively forced Carolinas to rely upon the proffer to present this legal argument. Carolinas omitted this portion of the hearing transcript from the record on appeal because neither Piedmont nor DHEC raised issue preservation as an argument in response to Carolinas' Dormant Commerce Clause argument. This portion of the hearing transcript demonstrates that Carolinas raised its Dormant Commerce Clause argument to the ALC. *See Long v. Norris & Assocs. Ltd.*, 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2000) ("So long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon . . . counsel to harass the judge by parading the issue before him again." (internal quotation marks and citations omitted)).

With respect to the evidence, the parties each presented and cross-examined witnesses and presented evidence relating to the application of CON Act and regulatory criteria and the competitive effects of their application, including the effects on interstate commerce. The central issue in dispute throughout the contested case hearing was whether and to what extent the establishment of Carolinas' proposed hospital would impact the outmigration of South Carolina residents to hospitals in North Carolina. Evidence and testimony on this issue was not expressly presented in relation to the Dormant Commerce Clause because it would have been improper for fact and expert witnesses to provide legal

opinions regarding the constitutionality of such application. However, contrary to the Court's suggestion in the Order, the ALC had sufficient facts from which to consider and determine if Piedmont's proposed application of the CON Act and regulatory criteria violated the Dormant Commerce Clause.

Following the conclusion of the parties' respective cases, the ALC discouraged the parties from providing closing arguments, which would have been the most appropriate time for Carolinas to renew its argument regarding the Dormant Commerce Clause. (Carolinas' Motion to Supplement, Attachment A: Tr. Trans. at pp. 2896:18-2898:2; 2906:19-23.) Instead, the ALC directed the parties to proffer their respective positions regarding the outstanding legal issues to the Court via written submissions. (Carolinas' Motion to Supplement, Attachment A: Tr. Trans. at pp. 2897:2-2903:14.)

Consistent with the ALC's direction, Carolinas presented its Dormant Commerce Clause argument by proffer. (Carolinas' Motion to Supplement, Attachment B: Carolinas' Counter Proffer of Evidence filed with the ALC on June 6, 2013.) In that pleading, Carolinas' Counter Proffer of Evidence filed with the ALC on June 6, 2013 ("Carolina's Proffer"), under the heading "Legal Argument" as Item #2, Carolinas submitted to the ALC the arguments previously advanced to Judge Matthews in Presbyterian's Motion for Summary Judgment and Memorandum in Support dated May 18, 2007 (labeled in the proffer as "Attachment 8"), which specifically included the Dormant Commerce Clause legal argument, although as the adoption of Presbyterian's prior argument. (Carolinas' Motion to Supplement, Attachment B: Carolinas' Proffer at Attachment 7 & 8.) Further, Carolinas own summary judgment motion dated May 21, 2007, which was identified as Attachment 7 to Carolinas' Counter Proffer, stated that:

> Taking SCDHEC's interpretation to its logical conclusion, the only hospitals that could apply for bed need would be the existing hospitals in the various counties in South Carolina, as there is no demonstrated bed need in the 2004-2005 SHP for any new facility. This would preclude not only new healthcare providers from entering the market, but virtually any new facility, such as FMMC. Such an interpretation would lead to anti-trust, commerce, free trade and constitutional issues with the State of South Carolina, as it would prohibit any new healthcare provider from ever entering any hospital market in South Carolina, and it would provide the existing hospitals with a captive and exclusive market.

(Carolinas' Motion to Supplement, Attachment B: Carolinas' Proffer at Attachment 7.)

Through this proffer, Carolinas argued, as it does in this appeal, against an application of the CON Act and State Health Plan that "places a barrier on any new entry in the South Carolina hospital market" and that "favor[s] in-state interest and actually closes the hospital market to out of state interest in favor of existing providers that cannot be justified and serves no use other than economic protectionism for the existing South Carolina hospitals." (Carolinas' Motion to Supplement, Attachment B: Carolinas' Proffer at Attachment 8.) This proffer, which Carolinas did not include in the record on appeal due to its relevancy, shows that Carolinas has been consistent in arguing that an interpretation, whether by DHEC or by the ALC, of the State Health Plan, CON Act, S.C. Reg. 61-15, and the Project Review Criteria that prevents a North Carolina health care provider from operating a hospital in York County and which favors a South Carolina provider is a violation of the Dormant Commerce Clause.

ii. The parties' post-trial motions and the ALC's Final Order and Amended Final Order provides further evidence that Carolinas raised its Dormant Commerce Clause argument to the ALC during the contested case hearing.

As indicated in its Final Brief, Carolinas timely filed a Motion to Alter or Amend the Final Order pursuant to ALC Rule 29(d) and Rule 59, SCRCP (the "Motion to Reconsider"). (R. pp. 227-249.) In Piedmont's Response Memorandum to the Motion to Reconsider, Piedmont argued that Carolinas failed to properly raise the Dormant Commerce Clause argument at the contested case hearing, and therefore this argument was untimely. (R. pp. 250-51.) Carolinas filed a Reply to Piedmont's Response Memorandum to the Motion to Reconsider, asserting, with supporting evidence, that its Dormant Clause Argument was not untimely.[4] (Carolinas' Motion to Supplement, Attachment C.)

The ALC initially vacated the Final Order. (R. p. 73.) Seven months after vacating the Final Order, the ALC issued an Amended Final Order, which included substantial revisions to the previous version. (R. pp. 74-126). In the Amended Final Order, the ALC revised portions of the prior Final Order to strengthen the ALC's decision from an appellate challenge on the basis of the Dormant Commerce Clause. For example, in the Final Order, the ALC stated, "This court concludes that the establishment of the FMMC will best serve the public needs by reducing the outmigration of York County residents to **North Carolina hospitals**." (R. p. 71) (emphasis added). In the Amended Final Order, the ALC revised the paragraph by deleting "North Carolina hospitals" and inserting "**hospitals beyond York County**." (R. p. 124) (emphasis added).

[4] Carolinas omitted the Reply to Piedmont's Response Memorandum to the Motion to Reconsider from its record on appeal based on relevancy. This Reply further shows how Carolinas' Dormant Commerce Clause argument was raised to the ALC during the contested case hearing and thus preserved for appellate review.

Despite Piedmont's issue preservation argument to the ALC, the ALC did not rule that Carolinas failed to preserve its Dormant Commerce Clause argument. Instead, the ALC specifically ruled upon the Dormant Commerce Clause argument by addressing it directly:

> [T]he court does not believe it violated the Dormant Commerce Clause in its analysis and application of the State Health Plan or Project Review Criterion in the original or amended decision. The same plan, criterion and analysis would have been utilized regardless of whether competing applicants were out-of-state or in-state providers. . . . Because the court chose to accept or reject certain testimony and assign different weight and credibility to the evidence presented by the parties in the *de novo* hearing does not mean that its decision violates the Dormant Commerce Clause or the Commerce Clause. Similarly, merely because [Carolinas] disagrees with the court's ruling, does not render its analysis in violation of the Dormant Commerce Clause.

(R. p. 75).

As noted above, in response to the parties' post-trial motions, the ALC: (1) vacated the Final Order; (2) took many months to issue an Amended Final Order which, among other revisions, attempted to address deficiencies related to Carolinas' Dormant Commerce Clause argument; (3) considered and rejected Piedmont's issue preservation argument; and (4) ultimately considered and ruled upon the Dormant Commerce Clause legal issue. Under the circumstances, the ALC reviewed and decided on the Dormant Commerce Clause legal argument, and consistent with the South Carolina Supreme Court's decision in *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) (discussed more fully below), the issue was properly preserved for appellate review.

c. The Court erred in concluding that it could not consider Carolinas' Dormant Commerce Clause argument because Carolinas' legal argument on the application of the Dormant Commerce Clause differed from Presbyterian's proffer argument.

The Court's decision on issue preservation concludes that Carolinas' legal argument regarding the Dormant Commerce Clause on appeal differs from the Dormant Commerce Clause argument previously raised at the conclusion of the first contested case in 2009, and therefore, it cannot be considered because the argument was not fully raised in its current form until the Motion to Reconsider was filed.

That ruling is at odds with the Court's rule that any doubts as to whether an appellant has preserved argument should be resolved in favor of finding the argument preserved, *see State v. Jenkins*, 408 S.C. 560, 568, 759 S.E.2d 759, 763 fn. 7 (Ct. App. 2014) (resolving doubt about issue preservation in favor of appellant) (citing *Atl. Coast Builders & Contractors*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"), and the South Carolina Supreme Court's more expansive interpretation of Rule 59, SCRCP. As the Supreme Court stated in *Elam, supra*:

> [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. . . . [C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, ... If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review.

Elam, 361 S.C. at 24-25, 602 S.E.2d at 780-81 (citations omitted).

The prior contested case and the present one were clearly in different postures. Given the ALC's ruling at the beginning of the second contested case hearing, Carolinas was not allowed to present its legal argument relating to the Dormant Commerce Clause, but Carolinas did present the legal issue in its opening statement and by proffer, and it has been consistent in arguing that any interpretation, whether it be by DHEC or the ALC, of the State Health Plan, CON Act, S.C. Reg. 61-15, and the Project Review Criteria that prevents a North Carolina health care provider from operating a hospital in York County and which favors a South Carolina provider is a violation of the Dormant Commerce Clause. The South Carolina Supreme Court's holding in *Elam* does not limit the issues that can be raised in a motion for reconsideration, and it is consistent with federal law on the subject. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (providing once a constitutional claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (holding although SCDOT did not phrase its objection in the exact terms used in issues on appeal, it was sufficient to preserve it for appellate review). Further, even if the Court determines that the proffer was incomplete, it was more than sufficient to show that Carolinas had argued and was arguing that any interpretation made in the CON process that results in prohibiting out-of-state competition violates the Dormant Commerce Clause. *See State v. Myer*, 301 S.C. 251, 391 S.E.2d 551 (1990) (providing that while the proffer was not complete, it was sufficient to preserve the issue for appellate review).

Additionally, because Carolinas has argued that it is the ALC's interpretation "as applied" that is unconstitutional, it would have been unlikely that Carolinas would have

advanced that argument until the ALC issued the Final Order, as Carolinas was defending DHEC's agency decision, which found in favor of Carolinas, and Carolinas' position was such that it was not arguing that DHEC's underlying agency decision was unconstitutional. *See In re Estate Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998) (providing when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issues for appeal); *Godfrey v. Heller*, 311 S.C. 516, 429 S.E.2d 859 (Ct. App. 1993) (providing where the theory of unjust enrichment was first raised in the trial court's order, appellant should have challenged this basis for recovery by a Rule 59(e) motion to preserve the issue for appeal).

II. THE COURT MISAPPREHENDED OR FAILED TO APPLY THE PROPER STANDARD OF REVIEW IN AFFIRMING THE FINDINGS OF THE ALC.

The Court referenced the proper standard of review in the Opinion as follows:

> The Administrative Procedure Act governs the standard of review from a decision of the ALC, allowing this court to reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Ct. App. Opp., p. 3) (citing S.C. Code Ann. § 1-23-380(5) (Supp. 2016)). Despite recognizing the applicable standard of review, the Court affirmed the ALC's Amended Order, which contained multiple errors of law.

In section III of the Opinion, the Court summarizes the arguments that Carolinas made in section III of its Final Brief and at oral argument as follows: "Carolinas contends

the ALC's application of certain Project Review Criteria was arbitrary and capricious." (Ct. App. Op., p. 5.) The Court rejects Carolinas' argument, as framed by the Court, holding: "the ALC's decision was rationally based on the standards in all of the pertinent Project Review Criteria and was, therefore, not arbitrary and capricious." (Ct. App. Op., p. 5.) In making this ruling, the Court misapprehends or overlooks that Carolinas, in section III of its Final Brief and at oral argument, raised legal errors as a basis for the Court to reverse the ALC's Amended Final Order. (Carolinas Final Br., pp. 29-49) ("The ALC **erroneously**, arbitrarily, and capriciously applied the CON Act, the State Health Plan, and Project Review Criteria. (emphasis added)). Accordingly, Carolinas requests that the Court order a rehearing in order to address its argument that the ALC's Amended Order should be reversed on the basis of it containing multiple legal errors.

III. THE COURT OVERLOOKED OR MISAPPREHENDED CAROLINAS' ARGUMENTS RAISED IN ITS MOTION FOR RELIEF AND PETITION FOR SUPERSEDEAS.

As required by S.C. Code Ann. § 44-7-220(B), Carolinas posted a $1.5 million dollar bond to perfect its appeal of the ALC's denial of its application for a certificate of need to construct a hospital in Fort Mill, South Carolina. In its Motion for Relief and Petition for Supersedeas and in its Supplemental Brief,[5] Carolinas sought relief from the appeal bond because it is unconstitutional under the South Carolina and United States Constitution. Carolinas maintains that the bond requirement under § 44-7-220(B) violates the separation of powers doctrine under the South Carolina Constitution because it interferes with the South Carolina Supreme Court's constitutional authority to promulgate

[5] Both pleadings are in the record of the Court. The Motion for Relief and Petition for Supersedeas was received by the Court for filing on March 17, 2015. The Supplemental Brief was deemed filed on March 27, 2015 but received by the Court on March 30, 2015.

its rule of procedure and practice in the appellate courts of this State. Carolinas further maintains that the bond requirement violates the Equal Protection Clause of the South Carolina and United States Constitutions because it imposes an arbitrary and discriminatory appeal bond requirement on a narrow class of appellants without being rationally related to a legitimate state interest. Lastly, Carolinas maintains that § 44-7-220(B) violates the due process provision of Article I, § 22 of the South Carolina Constitution by substantially burdening appellants' rights to judicial review of the ALC's certificate of need decisions involving a competing applicant. Because the South Carolina Appellate Court Rules are potentially inconsistent on whether this argument needs to be raised at this stage of the case in order to preserve the right to be considered by the South Carolina Supreme Court,[6] Carolinas incorporates by reference its arguments raised in its Motion for Relief and Petition for Supersedeas and its Supplemental Brief and Amendment of Motion for Relief and Petition for Supersedeas.

CONCLUSION

For the aforementioned reasons, Carolinas requests that the Court order a rehearing as prayed above, and reverse the Court's Order filed on September 8, 2015, and that it reverse the ALC's Amended Final Order.

[6] SCACR Rule 240(i) states: "(i) Rehearing. The court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Conversely, SCACR Rule 242(d)(2) states: "(d) Content of Petition.,,[o]nly those questions raised in the Court of Appeals **and** in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis added).

Respectfully submitted,

Douglas M. Muller, Esquire
Trudy H. Robertson, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen PLLC
78 Wentworth Street (29401)
P.O. Box 22828
Charleston, SC 29413-2828
(843) 579-7000 - telephone
(843) 579-7099 – facsimile

Attorneys for Appellant The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Medical Center – Fort Mill

January 26, 2017